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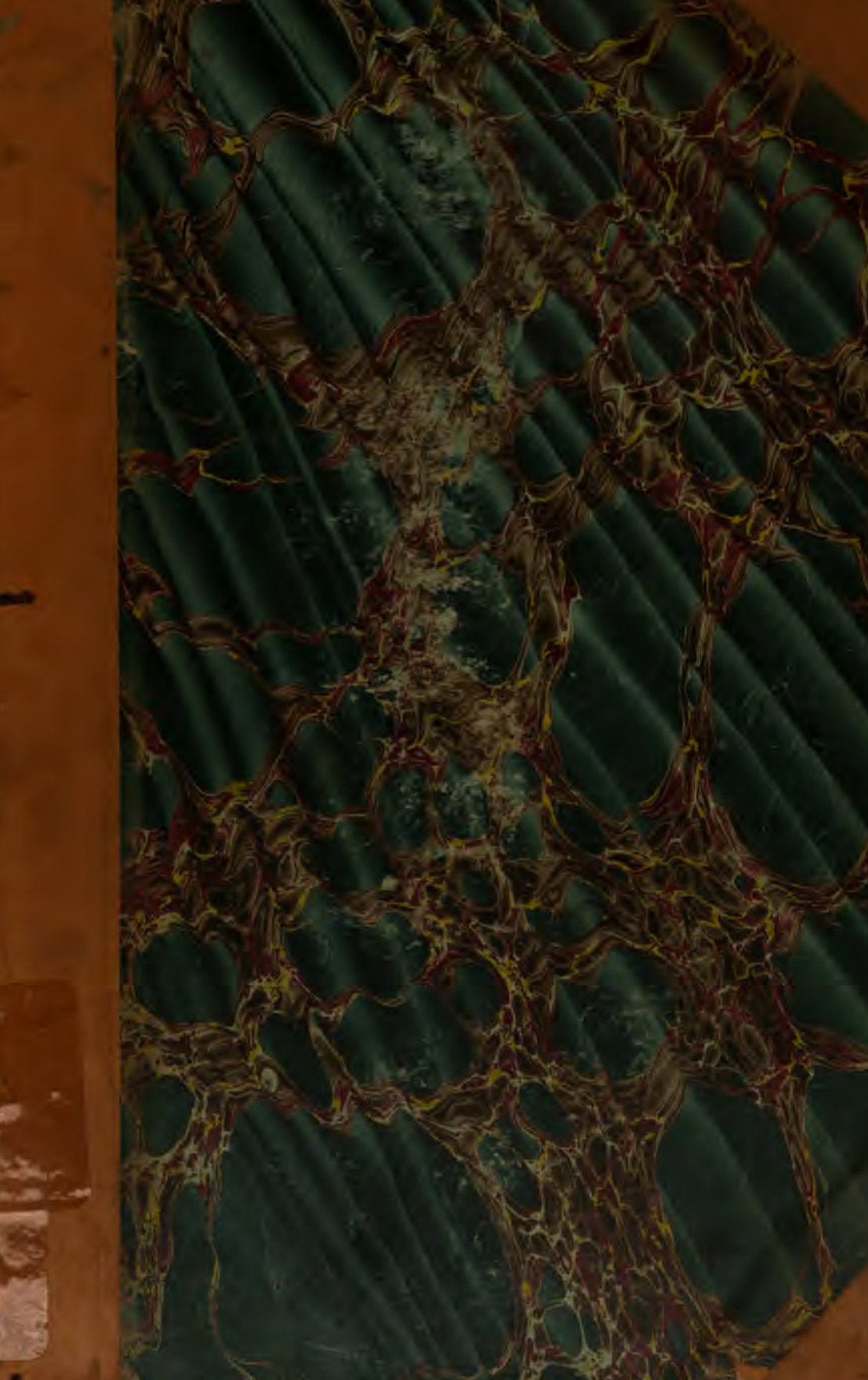
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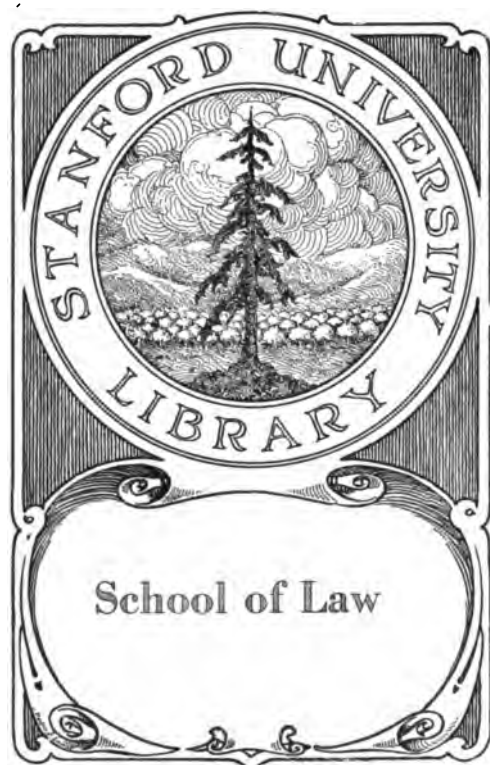
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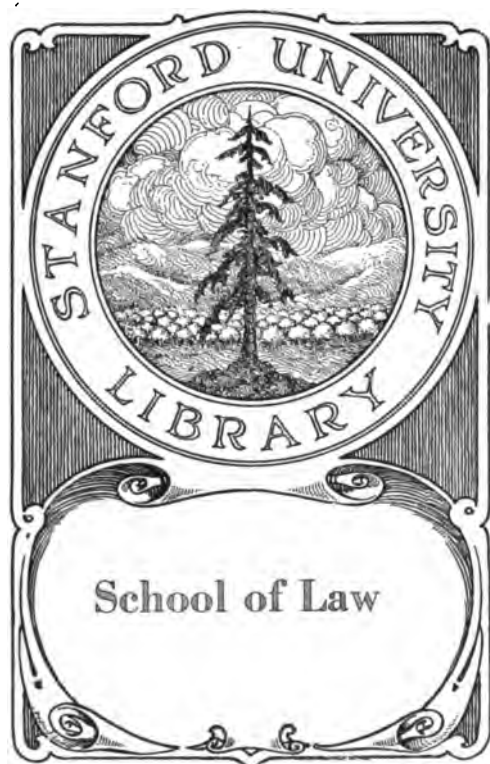




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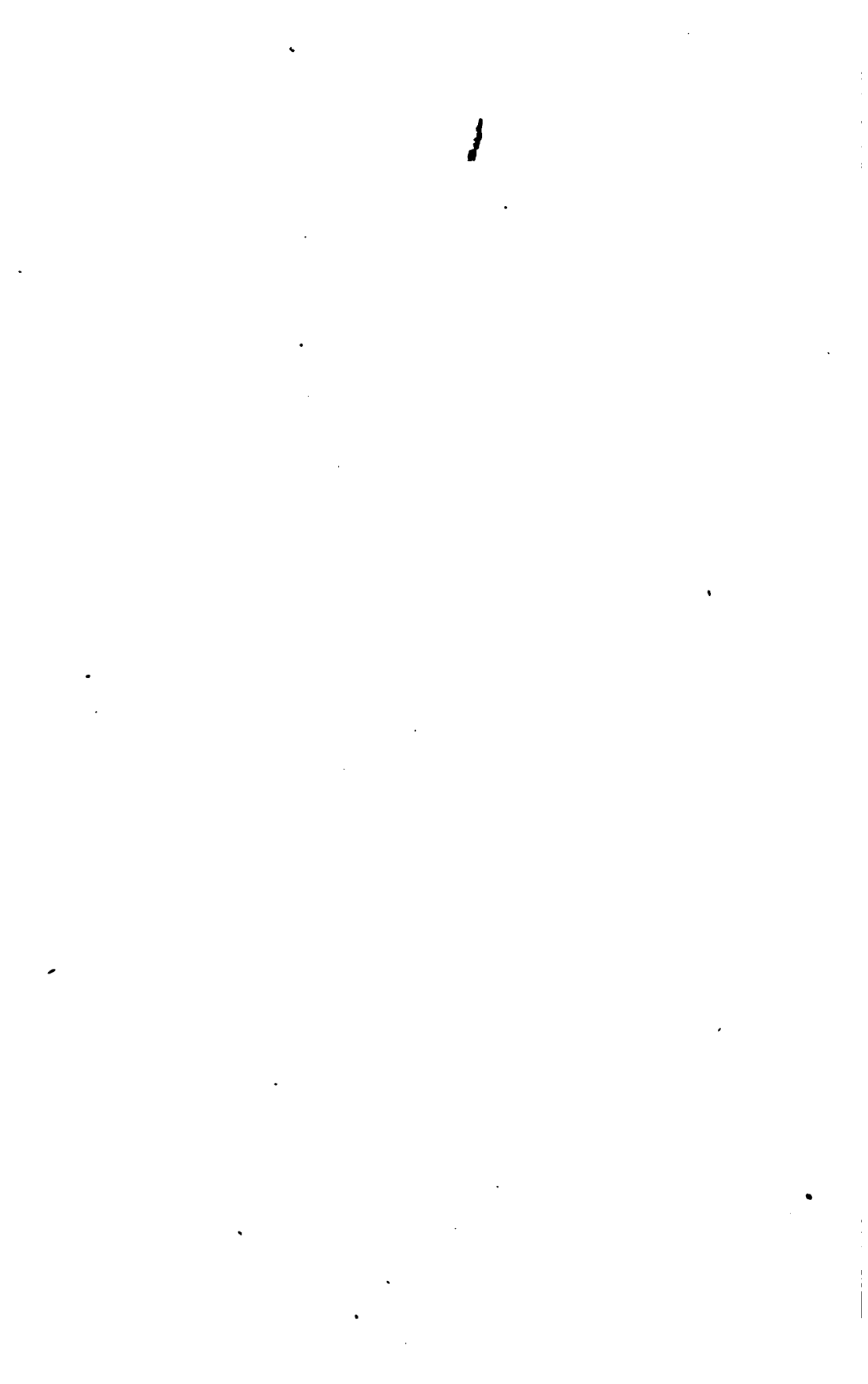
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THE COURTS OF THE SISTER PROVINCES.

DIARY FOR JANUARY.

1. SUN. *1st Sunday after Christmas.*
2. Mon. Municipal Elections. Heir and Devisee Sittings begun. County Court Term begins.
6. Frid. Epiphany. Christmas vacation in Chancery ends. County Court Term ends.
8. SUN. *1st Sunday after Epiphany.*
9. Mon. County York Assizes begin. Election of Police Trustees in Police Villages.
11. Wed. Election of School Trustees in Toronto. Master and Register in Chancery to pay over fees to Provincial Treasurer.
12. Thur. Court of Error and Appeal sits.
14. Sat. Last day for Common School Trustees to report to Local Superintendent. Trustees and Chairmen of Municipalities to make returns to Board of Audit.
15. SUN. *2nd Sunday after Epiphany.*
16. Mon. Municipal Councils (except Counties) and Treasurers of Police Villages to hold first meeting.
17. Tues. Heir and Devisee Sittings end.
21. Sat. Articles, &c., to be left with Sec. Law Society.
22. SUN. *3rd Sunday after Epiphany.*
24. Tues. First Meeting of County Councils.
29. SUN. *4th Sunday after Epiphany.*
30. Mon. School Finance Report to Board of Audit. Last day for Non-Resid. to give list of their lands.
31. Tues. Last day for City and County Clerks to make yearly returns to Provincial Secretary. Last day for Councils to report debts, &c.

THE

Canada Law Journal.

JANUARY, 1871.

COURTS OF THE SISTER PROVINCES.

NOVA SCOTIA.

The closer commercial and political relations now being cultivated between the different Provinces of the Dominion can in no way be better cemented than by diffusing as widely as possible, within the limits of Dominion territory, correct information upon all those topics in which each section feels a common interest and pride with the others.

A few years ago Nova Scotia and New Brunswick were to us in the west places of comparative indifference, and we knew but little of the people, institutions or resources of the Provinces. But the times have changed, and already an interest has been awakened, and a degree of anxious inquiry created amongst us, concerning our eastern brethren, which we have reason to believe they heartily reciprocate, and which promises to be productive of lasting benefit to the whole Dominion.

Anxious therefore further to increase this interest, and stimulate this spirit of inquiry into still greater activity, as well as to fulfil the duties which come legitimately within our sphere, we give to our readers in this issue a sketch of the Courts of Nova Scotia, their

powers, functions, officials, &c., which we hope will, so far as that Province is concerned, accomplish the end we have in view.

We may mention that our information is from an authentic source in Nova Scotia, whence also we hope to be able to obtain occasionally for publication short notes of important decisions, which will afford our professional readers at least a knowledge of the laws and legal procedure of that Province that cannot fail to be of interest.

THE SUPREME COURT.

The Supreme Court for the Province of Nova Scotia (having an Equity side over which the Equity Judge presides) exercises the same powers as are exercised by the Courts of Queen's Bench, Common Pleas, Chancery and Exchequer in England. Its original jurisdiction being both legal and equitable, embraces all kinds of actions, causes and suits, criminal and civil, real and personal, except actions for debt under \$20, in which case it exercises only appellate jurisdiction. It also has power to avoid patents of land by process of escheat, and possesses concurrent jurisdiction with the Vice Admiralty Court, under an Imperial Statute, for the trial of persons charged with the commission of crimes and misdemeanours on the high seas. Its practice and procedure are prescribed by the revised statutes of Nova Scotia, based upon and assimilated to the English Common Law Procedure Act. In cases not specially provided for by the statutes its practice and proceedings conform, as nearly as may be, to the practice and proceedings of the Superior Courts of Common Law in force previous to the first year of the reign of William IV., the proceedings and practice of the Court of Queen's Bench in England, however, prevailing where those Courts differ from each other. This court, presided over by any one of the judges, holds two Sessions a year for trials of issues in fact, and of Oyer, Terminer and General Gaol Delivery, in every County of the Province. In Halifax County those Sessions are called Sittings, and elsewhere they are designated Terms.

The Supreme Court also sits twice a year *in banco* at Halifax for hearing arguments of rules for new trials, appeals from the Sessions of the Equity Court, the Courts of Insolvency, Courts of Probate, Courts of Sessions, and from orders and decisions of single judges sitting at Chambers, as well as for the argu-

THE COURTS OF THE SISTER PROVINCES.

ment of special cases and demurrers. Appeals lie thence to the Judicial Committee of the Privy Council.

The following are the judges of the Supreme Court, five of whom by a recent act constitute a quorum :

Chief Justice Sir William Young, K.C.B. ; Hon. James W. Johnston, Hon. Edmund M. Dodd, Hon. Frederick W. DesBarres, Hon. Lewis M. Wilkins, Hon. John N. Ritchie, Hon. Jonathan McCully. Henry Oldright, Esq., is Reporter to the Court.

THE EQUITY COURT.

This Court, with its single judge presiding, is always open, and discharges the functions of the equity side of the Supreme Court, the Judge in Equity being also a Judge of the Supreme Court. Its jurisdiction, powers, &c., are identical with those of the Court of Chancery in England. Its forms of pleadings are those at Common Law, but modified to suit circumstances. The present Equity Court was organized and established by a recent Provisional Statute. Its sittings are always held at Halifax.

Judge in Equity : Hon. James W. Johnston.

THE PRACTICE COURT,

Or Chambers wherein one of the Judges presides, is held every Tuesday at Halifax during the year, except in vacation. The duties and powers incident to this Court are the same as those exercised by Judges at Chambers in England, but somewhat modified and more extensive. The matters which most engage the attention of this Court are motions to amend pleadings, for leave to plead and demur, to refer causes to arbitration, to set aside pleas, &c., &c. A Judge at Chambers on the first Tuesday of every month, except in vacation, hears and determines in a summary way all suits and appeals for sums under \$80, and cases of forcible entry and detainer, &c.

THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

The jurisdiction of this Court embraces all matters relating to prohibited marriages and divorces, and has power to declare any marriage null and void for impotence, adultery, cruelty, or kindred, within the degrees prohibited in the 32 Hen. VIII. Its practice and procedure are similar to that of the like court in England, except that co-respondents are not amenable to its jurisdiction, and juries are

not used, the judge having the exclusive right to try the issues in fact as well as to determine the law in all cases. The judge also has power to make rules and regulations to govern the practice. Appeals lie to the Supreme Court *in banco* in all cases, except on mere questions of costs. It has no stated periods of sittings, is always open, and sits as occasion requires. Its sittings are always held at Halifax.

Judge ordinary : Hon. James W. Johnston. Registrar, James H. Thorne, Esq.,

THE COURT OF VICE ADMIRALTY.

The jurisdiction of this Court may be said to extend to all maritime suits and causes. It also has jurisdiction in prize causes, and is the Court where prosecutions for violation of the Fishery laws are conducted ; in a word, its jurisdiction, functions, &c., are the same as those of like courts in the other maritime Provinces. It always sits at Halifax.

Judge and Commissary General, Sir William Young, K.C.B. Registrar, Lewis W. DesBarres.

THE COURTS OF PROBATE.

These Courts, of which there is one in every County of the Province, and two where the County happens to be divided, grant Probate and has testamentary jurisdiction over the estates of deceased persons, with power to appoint guardian to minors, children of persons who die intestate. Its practice and procedure are prescribed by the statutes of Nova Scotia, so far as they go, otherwise that of the Ecclesiastical Courts of England prevail and are followed. The laws of Nova Scotia regarding probate, the administration of estates, and the distribution of the estates of persons who die intestate, are based largely upon the English Statute of Distribution, &c., but somewhat assimilated to the laws in that respect prevailing in Massachusetts. Appeals lie from these Courts to the Judge in Equity at Halifax, and thence to the Supreme Court *in banco*.

THE INSOLVENCY COURTS,

Being created by "The Insolvent Act of 1869," have the same powers, jurisdiction, &c., as like Courts in the other Provinces of the Dominion.

THE COURTS OF SESSIONS,

Sits in the County of Halifax quarterly, and in some Counties twice, in others once a year. The Custos of the County presides. This Court is composed of the Custos, together with the

THE COURTS OF THE SISTER PROVINCES—ELECTIVE BENCHERS.

Justices of the County, the Grand Jury attending for municipal purposes. It has a limited jurisdiction in criminal matters which of late years has fallen largely into disuse. The duties now performed by this Court are confined almost entirely to local and municipal purposes.

MAGISTRATES COURTS,

Having jurisdiction in actions of debt, presided over by one Justice, when the whole dealing or cause of action does not exceed \$20, and by two where it is above \$20, but does not exceed \$80, exist in every County of the Province. Where a trespass has been committed by horses, cattle, &c., and the damages do not exceed \$12, a Justice of the Peace may try it, providing no question of title to land arises; and if the cattle alleged to have been trespassing are detained, and the alleged damage is not beyond \$12, a Justice may grant a writ of replevin for the same. Two Justices may hear and determine all complaints for common assault and battery, and may try bastardy cases, and may grant orders of affiliation. Prosecutions for illegal sale of intoxicating liquors are also confided to two Justices. The criminal jurisdiction now possessed by Magistrates in Nova Scotia, out of Sessions, has been conferred by Dominion Legislation.

ELECTIVE BENCHERS.

We regret to see that the proposition to make the Benchers of the Law Society elective has again been brought before the Legislature. The present Bill is however a Government measure, and may be expected to be, as it in fact is, more moderate and better digested than the crude Bill of last Session. Whilst we may rejoice at this the cause of rejoicing is but small, for it is the principle that we object to more than the details.

In thus objecting to the principle involved, if we do not speak for the majority of the profession, we claim to do so for those of the largest experience, and those who have had most occasion to think carefully on the subject, and to whose opinions we would give the most weight, and we now allude to those who have no connection with the present management.

The question now is, not whether there are defects, for that may for the sake of the argument be admitted, but whether the proposed change will remedy the alleged evils, and whether the cure will not be worse than the

disease. Desperate cases may require desperate treatment, but to speak of anything being desperately bad in the present management is simply childish exaggeration. For even admitting all that is alleged, we can still boast that the Law Society of this Province, and its system of education for students, and its management in general is equal, if not superior, to any similar institution in the world. Why then such a violent remedy for so mild a disease. The effect must surely be bad; it cannot in the ordinary course of events be otherwise.

Probably nothing that can now be said will affect the result of the present bill, and it will perhaps be only left for us to make the best of what we cannot avoid—for even many of those who strongly disapprove of the change think it most prudent to accept the present situation and secure as moderate an act, and containing as many safeguards, as possible—but we cannot allow the Bill to go as it were by default, or tacitly admit that there is only one side to the question.

Whether it would not be wiser in those we have just alluded to, as in those who are responsible to the profession and public for their future as well as present well-being, to resist any hurried action, and ascertain the calm dispassionate voice of the profession (which we contend has never yet been done), after hearing the arguments on both sides, may well be questioned. It must not be forgotten also that a House composed of the elements that must necessarily be found there is eminently unfit to discuss the subject with advantage; and of the lawyers that are members of the House, we may safely say without fear of offending them, that there are very few that the profession would choose to decide upon a question so vital to their interests. Besides this, party politics enter largely even into matters of this kind. Again, there is no second House to act as a safeguard on hasty legislation, and it requires no ordinary courage and strength in the leader of a government to stand up against outside pressure, when he is not backed up by an Upper House (which unfortunately our constitution denies to us) less amenable to the voice of a fickle public, and not swayed by the influences that govern an elective body.

Even hastily as changes are now made, the House evidently felt a difficulty when attempting to alter the details of this Bill, and handed it over with rather ludicrous alacrity to those

ELECTIVE BENCHERS.

few who, in the House, have even the slightest knowledge of the subject.

The following is the Bill as introduced:—

Whereas, it is expedient that a change be made in the manner of the election of benchers of the Law Society, and petitions have been presented, praying for the same. Therefore, &c.

1. [Repeals Con. Stat. U. C. Cap. 83, s. 1.]

2. The present benchers shall hold office, and continue with all their duties and powers unimpaired until the first day of Hilary Term, 1872, as if the said fourth section had not been repealed; and all By-laws, resolutions, rules and regulations of the Law Society at present existing, or which shall be passed by the present benchers until the said first day of Hilary Term, 1872, except so far as the same are, or shall be inconsistent with this Act, shall remain in full force and effect until altered by the benchers to be appointed as hereinafter provided for.

3. On the first day of Hilary Term, 1872, the present benchers except as hereinafter provided, shall cease to hold office, and from and after that day the benchers of the Law Society, exclusive of *ex-officio* members, shall be thirty in number, to be elected as hereinafter provided.

4. The Attorney-General for the time being of the Province of Ontario, and all members of the Bar of Ontario, who shall have at any time held the office of Attorney-General for the Province of Ontario, or of Attorney-General or Solicitor-General for that part of the late Province of Canada, formerly Upper Canada, and any retired Judge or Judges of the Superior Courts of Law or Equity for the Province of Ontario, shall respectively *ex-officio* be Benchers of the Society.

5. Her Majesty's Counsel learned in the Law of the Bar of Ontario, shall elect from among themselves twelve persons to be Benchers of the said Law Society.

6. For the purpose of the election of the remaining eighteen Benchers, this Province shall be deemed to be divided into the five districts following:—

One comprising the Counties of Essex, Lambton, Kent, Middlesex, Elgin, Oxford, Huron, Perth and Bruce.

One comprising the Counties of Wellington, Waterloo, Brant, Norfolk, Haldimand, Monck, Welland, Lincoln, Wentworth and Halton.

One comprising the Counties of Grey, Simcoe, Peel, York, Ontario, and the Districts of Muskoka, Algoma and Parry Sound.

One comprising the Counties of Victoria, Durham, Peterborough, Northumberland, Hastings and Prince Edward.

One comprising the Counties of Frontenac, Lennox and Addington, Renfrew, Leeds, Lanark, Grenville, Dundas, Stormont, Glengarry, Prescott, Russell and Carleton.

The said Districts shall be termed respectively, the London, Hamilton, Toronto, Cobourg and Brockville Districts.

7. For each of the said districts other than Toronto there shall be elected by the Members of the Bar, usually resident and practising in the said districts respectively, three Members of the Bar, of at least ten years standing, and whether resident or practising in said respective districts or not, and whether the same shall be one of Her Majesty's said Counsel or not, to be Benchers of the Law Society; and for the Toronto District, there shall be similarly elected as Benchers six members of the like standing.

8. The first election for such of the Benchers as by this Act are directed to be elected by Her Majesty's Counsel and of such Benchers as hereby directed to be elected for the Toronto District, shall take place on the first Saturday in the Michaelmas Term next succeeding the passing of this Act, and every subsequent election of such members as are hereby directed to be elected by Her Majesty's Counsel and of such Benchers as are hereby directed to be elected for the district of Toronto, shall take place on the first Saturday of the Michaelmas Term, in the year proper for holding such election; and such elections shall take place at Osgoode Hall, Toronto.

9. The first election for the districts of London, Hamilton, Cobourg, and Brockville, shall take place on the first Wednesday after Michaelmas Term next succeeding the passing of this Act; and every subsequent election for the said districts, shall be held on the first Wednesday after Michaelmas Term in the year proper for holding such elections: and such elections shall take place in the Court House of the Cities of London and Hamilton, and of the Towns of Cobourg and Brockville, respectively, for the districts in which such cities and towns are situated respectively.

10. In the case of such elections as are by this Act directed to be held at Osgoode Hall, in the City of Toronto, the Secretary to the Law Society for the time being shall act as Returning Officer, and shall receive the votes of all Her Majesty's said Counsel, and of all Members of the Bar entitled to vote at such elections, and shall record in separate books to be kept by him for that purpose, one for the election by Her Majesty's said Counsel, and another for the election by the Members of the Bar, the name and residence of each person voting together with the names of those for whom such person shall have voted: and such books shall be returned by the Secretary to the first meeting of the newly elected Benchers, together with all such books kept for a like purpose by the other Returning Officers, and which by this Act are required to be returned by such Returning Officers to the Secretary for the time being of the Law Society.

ELECTIVE BENCHERS.

11. In the event of there being no Secretary for the time being of the Law Society at the time at which any election under this Act is to be held at Toronto, or in the event of such Secretary being unable from illness or other unavoidable cause to act as returning officer at such election, then and in such case the treasurer for the time being of the Law Society shall appoint under his hand some other person to act as such returning officer, and such person so appointed shall perform all the duties of such returning officer as prescribed by this Act, and shall be entitled to receive the remuneration provided by this Act for the performance of such duties.

12. The Secretary of the Law Society for the time being, or such other person as may be appointed under the last preceding section, shall as soon as conveniently may be, by inspection of the books directed to be kept by him by the tenth section of this Act, determine who are the persons duly elected under this Act as benchers elected by Her Majesty's counsel and by the Members of the Bar for the district of Toronto, and shall advertise the same, together with the names of such persons as may be returned to him as duly elected for the other districts referred to in this Act in the *Ontario Gazette*, at least two weeks before the first day of Hilary Term then next ensuing.

13. The secretary of the Law Society for the time being, or such other person as shall be appointed under the eleventh section of this Act, shall attend at Osgoode Hall for the purpose of receiving all votes that shall be tendered to him from the hour of (ten) in the forenoon of the day appointed by this Act for such elections as are to be held by him, till the hour of (four) in the afternoon of the same day.

14. In the case of such elections as are by this Act directed to be held in the districts of London, Hamilton, Brockville, and Cobourg, the County Court Judge for the County in which such election is directed to take place shall act as returning officer for such district, or in the event of there being a vacancy in the office of County Court Judge for such county at the time when any such election is by this Act appointed to take place, or in the event of the County Court Judge being unable from sickness or other unavoidable cause to act as returning officer, then the Clerk of the County Court for the city or town wherein the election is to take place shall act as the returning officer.

15. The County Court Judge or other person acting as returning officer, under the provisions of the last preceding section, shall receive the votes of all persons entitled to vote for the district in which such election shall take place, and shall record in a book to be kept by him for that purpose, the name and residence of each person voting, together with the names of those for whom such person votes, and shall return such book together

with the return of members elected for such district, to the secretary for the time being of the Law Society at Toronto, at least three weeks before the first day of Hilary Term next ensuing.

16. The County Court Judge or other person acting as returning officer shall, as soon as conveniently may be, by inspection of the book required to be kept by him by the last preceding section, determine who are the Benchers duly elected for the district in which such election has taken place, and shall under his hand return the names of such Benchers to the secretary of the Law Society for the time being, at least three weeks before the first day of Hilary Term next ensuing such election.

17. The County Court Judge, or person acting as returning officer, under the fourteenth section of this Act, shall attend at the court house of the city or town in which the election is to take place, from the hour of (ten) in the forenoon of the day appointed by this Act for such election, to the hour of four in the afternoon of the same day, for the purpose of receiving all votes that shall be tendered to him.

18. The person acting as returning officer under any of the preceding clauses shall be entitled to be paid out of the funds of the Law Society the sum of ———, in addition to necessary disbursements, for each occasion whereon he acts as such officer.

19. The persons so elected Benchers as aforesaid shall take office on the first day of Hilary Term following their election, and shall hold office until the beginning of the Hilary Term which shall be the fifth after they shall have entered on their said office, or till the election of their successors.

20. It shall be competent for the majority of the Benchers present at any meeting in the first Hilary Term after their election, to appoint a committee of their number to enter upon an enquiry with respect to the due election of any of the said Benchers whose election or elections may be petitioned against by any member of the Bar who has voted in the particular district for which the Bencher or Benchers petitioned against have been elected, or if the petition is against the return of any of the Benchers elected by Her Majesty's counsel; then on the petition of any of Her Majesty's counsel who voted at the election of such Bencher or Benchers, and after such enquiry, to report such Bencher or Benchers as duly or not duly elected or qualified according to the fact, and, if necessary, to report the name or names of the next in order of votes of the duly qualified Members of the Bar, or of Her Majesty's counsel, as Bencher or Benchers in lieu of the person or persons petitioned against and reported not duly elected or qualified; and on the confirmation of the said report by the majority of Benchers (other than

ELECTIVE BENCHERS—AN ENTERPRISING BARRISTER.

those petitioned against) present at any meeting for that purpose, the person or persons so reported in lieu of those petitioned against as aforesaid shall be taken and deemed to be the duly elected and qualified Benchers or Benchers.

21. No petition against the return of any Benchers shall be entertained unless such petition shall be filed with the Secretary of the Law Society at least ten days before the first day of Hilary Term next succeeding such election, and shall contain a statement of the grounds on which such election is disputed, and unless a copy of such petition be served upon the Benchers whose election is disputed at least ten days before the first day of the said Hilary Term, and no grounds not mentioned in petition shall be gone into on the hearing of such petition.

22. On any such notice being duly filed as aforesaid, the Benchers shall during the first week of the Hilary Term succeeding each election, appoint a day for the hearing of such petition, and give notice of such day to the petitioner, and to the person whose return is disputed; provided that all such petitions shall be finally disposed of during the said Hilary Term.

23. On the hearing of any such petition the Benchers shall have power to examine witnesses under oath; and a summons under the hand of the Treasurer of the Law Society or under the hand of three Benchers, for the attendance of a witness, shall have all the force of a subpoena, and any witness not attending in obedience thereto, shall be liable to attachment in either of the Superior Courts.

24. Any person petitioning against the return of any Benchers shall deposit with the Secretary of the Law Society the sum of to meet any costs which such Benchers shall be put to in the opinion of the Committee before which such petition shall be heard; and such Committee shall have power in the event of such petition being dismissed, to award such sum to be paid to the Benchers petitioned against as in their opinion is just, and shall have power in their discretion in the event of such Benchers being decided to be not duly elected or qualified, to award costs to the petitioner, and the costs so awarded shall be recoverable in any Court of competent jurisdiction.

25. The Benchers shall, on the first meeting after their election proceed to elect one of their body as Treasurer, who shall be the President of the Society, and shall have all such powers as are at present possessed by the Treasurer of the Law Society; and such Treasurer shall hold office until the appointment of his successor; and the election of Treasurer shall take place on the first Saturday of Hilary Term in each year; provided that the retiring Treasurer shall be eligible for re-election.

26. In case of the failure in any instance, in any district, to elect the requisite number of

duly qualified Benchers therefor, according to the provisions of this Act, or in case any of Her Majesty's counsel, or Member of the Bar, shall have been elected for more than one district, or in case one of Her Majesty's counsel shall have been elected for one district, and as one of the Benchers to be elected by Her Majesty's counsel under the provisions of the fifth section of this Act, or in case of any vacancy caused by the death or resignation of any Benchers, then it shall be the duty of the remaining Benchers, with all convenient speed, at a meeting to be specially called for the purpose, to supply the deficiency in the number of Benchers failed to be elected as aforesaid, or caused by any of the means aforesaid, by appointing to such vacant place or places, as the same may occur, any person or persons duly qualified under the provisions of this Act to be elected as a Benchers; and the person or persons so elected shall hold office for the residue of the period for which the other Benchers have been elected.

27. At all elections to take place under this Act, all retiring members shall be re-eligible.

AN ENTERPRISING BARRISTER.

We like enterprise; we think we have been enterprising ourselves in a small way, and therefore have a fellow-feeling for those who desire, by enterprise, to do well for themselves in their business. But there are limits even to this, especially so far as our honorable profession is concerned. Its traditions draw the lines somewhat closely, and would be scandalized by what is expressed by the slang phrase, "touting for business."

Some extra-particular brethren even object to what they call the un-English practice of advertising cards in newspapers; but we do not go so far as this, and can see no great difference between this direct mode of advertising—which is in accordance with the custom that has prevailed in this country for many years past—and the many indirect modes of bringing themselves before the public adopted by professional men in England.

We must confess, however, to having had our professional feathers somewhat ruffled recently by seeing a printed circular, issued by a Barrister, and an "M.A.," sent to country practitioners throughout Ontario, in which he informs "Dear Sir" as follows:—"As Michaelmas Term is at hand, by enclosing me (each) \$20, I shall be happy to take out your Law Certificates, and forward them to you free of expense."

REGISTRY OFFICES—LAW SOCIETY, MICH. TERM, 1870—MISTAKES OF LAW.

This is "cheap," not to say "nasty," but it is unnecessary to point out the objectionable features of this mode of "working up" an agency business; they are patent to all who desire, with us, to uphold all that is nice and seemly in the members of the cloth. If there are any who disagree with us, we can only say that they are so few as only to form the exception generally supposed to be necessary to prove the rule.

MULTIPLICATION OF REGISTRY OFFICES.

It is proposed to make several new Registry Offices in Ontario, the reason being, we understand, that the emoluments from some are much greater than it is reasonable for any one public officer to receive.

Persons holding official positions should undoubtedly be paid in proportion to the labour and responsibility involved, and the education and attainments necessary for the proper discharge of the duties of the office, and we gladly testify to the efforts of the Attorney General in this respect to supplement the salaries of the Judges of the Superior Courts. It would be a shame, for instance, that a registrar should be paid or receive from his office a salary as large as that of one of the judges, and we are told such is the fact in some few instances. But is the only remedy in the premises the division of counties for registration purposes?

The practising attorneys, and they know more about it than all the legislators—eminent Queen's counsel, highly respectable farmers, and whatever else they may be, put together. The system of pulling registration divisions into fragments is a bad one—it entails expense, it causes great confusion and trouble in searching titles and is a nuisance to the practitioners who do the bulk of the business with these officers. It is sufficient that a Registration District is divided when an alteration is made in the size of a County. Lawyers congregate of course in county towns, and, instead of being able to search titles with promptitude, and with any degree of precision, by a personal reference to the books and original memorials, are compelled to trust to abstracts or agents instead. If the fees received by some registrars are too great, and if a change has to be made, surely some other remedy could be found. One proposes to fund the fees; but

whatever is to be done, we hope some other expedient will be found other than multiplying Registry offices, to the great inconvenience of the public and those who do the business of the public in connection with them.

LAW SOCIETY—MICH. TERM, 1870.

During this Term Hon. Sidney Smith, Q.C., and D'Arcy Boulton, Esq., Barrister-at-Law, were elected Masters of the Bench.

The following gentlemen were called to the Bar:

Daniel Wade, Brockville; James H. MacDonald, Toronto; Charles A. Brough, Goderich; Frank Arnoldi, Toronto; George A. Boomer, Toronto; William J. Green, Toronto; (without an oral). Also Henry F. Holland, Cobourg; Fred. G. A. Henderson, Belleville; D. Sheldon Smith, Brantford; E. H. Smythe, M.A., Kingston; C. W. Matheson, Simcoe; David L. Scott, Brampton; Michael Houston, Chatham; Edward Burns, Sarnia; and J. T. St. Julien, of the Quebec Bar.

And the following gentlemen were admitted as Attorneys:

S. R. Clarke, Toronto; C. A. Brough, Goderich; Henry Muckle, Toronto; D. S. Smith, Brantford; E. H. Smythe, Kingston; Wm. J. Green, Toronto; G. A. Boomer, Toronto; M. Houston, Chatham; (without oral). Also Leonard McL. Stewart, Ottawa; T. A. Keefer, Strathroy; George Brunel, Toronto; Jno. S. Ewart, Kingston; John R. Cartwright, Kingston; Peter Purves, Brantford; J. B. Brown, Toronto; Cox, and Æ. Macdonald.

The Scholarships were awarded as follows:

- 4th Year. F. A. Cryslar, who obtained 283 marks on a maximum of 360.
- 3rd Year. R. M. Fleming, who obtained 284 marks on a maximum of 320.
- 2nd Year. Not awarded.
- 1st Year. J. McMillan, who obtained 248 marks on a maximum of 320.

SELECTIONS.

MISTAKES OF LAW.

Ignorantia juris neminem excusat is a familiar maxim of the law, but its practical application has been the source of much perplexity. Whether, for instance, money paid through ignorance of the law can be recovered back, is a question much vexed, and involved in no inconsiderable doubt. We propose, in the following article, to examine the English and American authorities on the subject, and to discover, as far as we may be able, the rule to be deduced from them.

One of the earliest, as well as leading cases on the subject is that of *Bilbie v. Lumley*, 2 East, 469. * * * * *

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Lord Ellenborough asked the plaintiff's counsel "whether he could state any case where, if a party paid money to another voluntarily, with full knowledge of the facts of the case, he could recover it back again, on account of his ignorance of the law?" No answer being given, his lordship continued, that the only case he ever heard of was that of *Chatfield v. Paxton*, where Lord Kenyon, at nisi prius, had intimated something of the sort. "But, when it was afterward brought before the court, other circumstances were relied on, and it was so doubtful on what ground it turned that it was not reported." "Every man," continued Lord Ellenborough, "must be taken to be cognizant of the law; otherwise there is no saying to what extent ignorance might not be carried. It would be urged in almost every case." The only case cited by his lordship to sustain this doctrine was that of *Lowry v. Bourdieu*, Dougl. 468, in which he said, "money paid under a mere mistake of law was endeavored to be recovered back; and there Buller, J., observes, that *ignorantia juris non excusat, etc.*" But an examination of that case shows that it was decided on entirely other grounds. The action was brought to recover back money paid on a policy of insurance on a ship and cargo, in which the insured had no interest, and three of the justices, Lord Mansfield, Buller and Ashhurst, J. J., were of the opinion that it was a gaming policy, and against an act of parliament, and that, therefore, the law could not aid the plaintiff in recovering back what he had paid according to the rule, *pari delicto melior est conditio possidentis*. Mr. Justice Willes did not concur, however, but said he supposed the parties believed there was an interest, and that it would be very hard that a man should lose what he had paid under a mistake. Mr. Justice Buller, in the course of his remarks, observed that there was no mistake in matter of fact, and if the law was mistaken, the rule applies, *ignorantia juris non excusat*. This observation was clearly *obiter*, as he, with the majority of the judges, had expressly held the policy to be a gaming policy, and the transaction beyond the aid of the court. Still, it is urged that Lord Mansfield and Mr. Justice Ashhurst would not have suffered the *dictum* to pass without animadversion if they had not assented to its correctness.* It is hardly necessary to remark that this argument can have but little weight in the consideration of the question. It will be seen, therefore, that the case of *Bilbie v. Lumley*, which is very often cited, and which is "one of the main pillars on which the subsequent decisions and *dicta* on the subject rest," is itself based upon a very doubtful foundation.

The case of *Chatfield v. Paxton*, referred to by Lord Ellenborough, and given in a note

to *Bilbie v. Lumley*, need not be noticed in full, as it turned on other points.

It may be well at this point to refer to two or three cases decided prior to *Bilbie v. Lumley*, apparently holding a different doctrine. The first is *Furmen v. Arundel*, 2 W. Black. 825, which was an action for money had and received, and in which Chief Justice De Grey said: "Where money is paid by one man to another on a mistake, either of fact or of law, or by deceit, this action will certainly lie." In *Bize v. Dickason*, 1 T. R. 285, where there were mutual debts between two persons, and one of them becoming bankrupt, the other, instead of setting off his own claim, as he might have done, paid the assignees in full; and it was held that he might recover an amount corresponding to that which he had neglected to set off, in an action for money had and received against the assignees. In rendering judgment, Lord Mansfield said; "The rule has always been, that, if a man has actually paid what the law would not have compelled him to pay, but what, in equity and in conscience, he ought, he cannot recover it back;" and he gave, in illustration, the case of a debt barred by the statute of limitations, or contracted during infancy. "But," he continued, "where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back."

These two cases were cited by the plaintiff in the subsequent case of *Brisbane v. Dacres*, 5 Taunt. 143, and were commented on by the judges in their opinions. Gibb, J., after quoting the declaration of De Grey, C. J., given above, said: "Now, the case did not call for this proposition so generally expressed; and I do think that doctrine, laid down so very widely and generally, where it is not called for by the circumstances of the case, is but little to be attended to; at least, it is not entitled to the same weight in a case where the attention of the court is not called to a distinction as it is in a case where it is called to the distinction." And of the conclusion of Lord Mansfield, in *Bize v. Dickason*, he said: "I cannot think Lord Mansfield said 'mistake of law,' for Lord Mansfield had, six years before, in *Lowry v. Bourdieu*, heard it said: "Money paid in ignorance of the law could not be recovered back," and had not dissented from the doctrine; and Buller, J., sat by him who had expressly stated, six years before, in *Lowry v. Bourdieu*, and would not have sat by and heard the contrary stated without noticing it." It may be remarked, in passing, that conjectures of what Lord Mansfield or Mr. Justice Buller would or would not have done are worth but little. Lord Mansfield undoubtedly said "mistake," and it can hardly be doubted, from the context, that he meant *mistake of law* as well as of fact. Chambre, J. in *Brisbane v. Dacres*, said; "The opinion of De Grey is not a mere *dictum*, it is part of the argument—it is a main part of the argument." Mansfield, C. J.,

* Per Gibb, J., in *Brisbane v. Dacres*, 5 Taunt. 143, and Sutherland, J., in *Clarke v. Dutcher*, 9 Cow. 681.

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speaking of De Grey's opinion, said: "It certainly is very hard upon a judge, if a rule which he generally lays down is to be taken up and carried to its full extent." "In the case of *Biss v. Dickason*," he adds, "the money ought conscientiously to have been repaid."

Thus far we have on the one side the undoubted *dictum* of Mr. Justice Buller and the decision of Lord Ellenborough, that mistakes of law cannot be remedied, and, on the other side, the "intimation" of Lord Kenyon, the *dictum* (if it be only a *dictum*, which is very doubtful) of Chief Justice De Grey, and the opinion of Lord Mansfield.

The next important case on the subject is that of *Brisbane v. Dacres*, already cited. Here the plaintiff, while captain of a vessel belonging to the squadron of Admiral Dacres, had received on board his vessel a quantity of public specie and a large amount of private treasure, to be transported to England. Of the freight received for both, he paid over one-third part, according to a usage therefore established in the navy, to the admiral. Discovering that the law did not require captains to pay to admirals any part of the freight, he brought an action for money had and received, to recover it back from the admiral's executrix. The court held, unanimously, that he could not recover back the private freight. Gibbs, J., on the ground that it was illegal to carry the private treasure. Chambre, J., that, whether illegal or not, it was the practice of the admiral to receive his third part, and that that practice had the assent of the government. The point chiefly considered, however, by all the judges, respected the part of the freight paid on the public specie, and they held against Chambre, J., that the plaintiff could not recover. Gibbs, J., rested the case mainly on the ground that the money, being paid through a mistake of law, could not be recovered. He said: "We must take this payment to have been made under a demand of right, and I think that when a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is made, has paid a sum, he never can recover back the sum he has so voluntarily paid." But, apparently hesitating to run counter to Lord Mansfield's maxim before cited, he said he had "considerable difficulty in saying that there was anything unconscientious in Admiral Dacres in requiring this money to be paid to him, or receiving it when it was paid." Heath, J., found it "very difficult to say that there is any evidence of ignorance of the law here," and Mansfield C. J., admitted that, "according to the doctrine of Lord Kenyon, an action might be maintained to recover it back, but I do not see how the retaining this is against his conscience." It is but fair to presume from the opinions, that the case of *Brisbane v. Dacres* turned upon the distinction that there was nothing

in the transaction contrary to *æquum et bonum*.

In *Stevens v. Lynch*, 12 East, 88, the defendant—the drawer of a bill of exchange—with full knowledge of the fact that the plaintiff had given time to the acceptor after his dishonor of the bill, said to the holder: "I know that I am liable, and if the acceptor does not pay it I will." The court held that the defendant could not now defend upon the ground of his ignorance of the law when he made the promise.

The case of *Bilbie v. Lumley* above cited was recognized in *Gomery v. Bond*, 3 M. & S. 378, and in *East India Company v. Tritton*, 3 B. & C. 280. Neither of these cases has much value on the question under consideration. In *Gomery v. Bond* the defendant agreed for the purchase of some seed, but, on its being brought to him, would not accept it; on which the plaintiff requested him to try and sell it for him, which he tried to do, but, failing, brought it back again; the plaintiff refused to receive it, and brought the action for the price. The judge submitted to the jury: 1. Whether there was an agreement for sale. 2. Whether the plaintiff had waived it. 3. Whether he had done so in ignorance of his rights, telling them "that, if he did it under an ignorance of the law and impression that his remedy was gone, it would not amount to a waiver of the benefits of the agreement." The plaintiff had a verdict. A rule for a new trial was obtained on the ground that the third question was improperly submitted to the jury. Nothing was said directly about ignorance or mistake of rights; Lord Ellenborough thought there could be no doubt from the evidence that the plaintiff had waived the contract.

In the *East India Company v. Tritton* the plaintiffs sued to recover money paid by them as acceptors of a bill of exchange to the defendants on the faith of an insufficient prior indorsement, of the validity of which the plaintiffs had, and the defendants had not, the means of judging. The defendants received the money as agents, and before any notice of the insufficiency of the indorsement. The court held that the action could not be maintained, basing their arguments mainly on the grounds that the agents, having paid the money over to their principals in good faith, were not liable. Holroyd, J., thought the case of *Bilbie v. Lumley* sufficient to dispose of the question, but agreed with the majority of the court on the ground above stated.

Milnes v. Duncan, 6 B. & C. 671, contains a *dictum* of Mr. Justice Bailey, that "if a party pay money, under a mistake of the law, he cannot recover it back;" but that case was concededly one of error of fact, and on that alone was the decision based.

In *Goodman v. Sayens*, 2 Jack. & W. 248, and in *Marshall v. Collett*, 1 Younge & Coll. 232, the maxim was repeated, but in neither was it demanded.

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In *Brumston v. Robius*, 4 Bing. 11, a landlord's receiver allowed the tenant to make a deduction in respect of a payment for land tax every year for seventeen years greater than the landlord was liable to pay. The tenant assigned his tenancy, and the landlord, discovering his mistake, distrained the assignee for the arrears. The court held that he had no right so to do. The court placed great stress upon the hardship of the case, and it was remarked that "the demand was most unconscientious." Best, C. J., however, observed that "it is an established principle, that if money be given or paid (and settlement in account is the same thing) with a full knowledge of all the circumstances at the time of the payment, it cannot be recovered back by the payer," citing *Brisbane v. Dacres* as authority.

There is a class of cases growing out of similar subject-matter as the above, and which are said by Mr. Justice Story, 1 Eq. Juris. sec. 112, to resolve themselves into an overpayment by mistake of law or of fact, and probably of the former. In this class may be cited *Widley v. Cooper's Company*, and *Atwood v. Lamprey*, cited in a note to *East v. Thornbury*, 3 P. Wms. 127; *Currie v. Gould*, 2 Madd. 163; *Smith v. Alsop*, 1 id. 628; *Nichols v. Lason*, 3 Atk. 573. But it does not appear in any of these cases that the mistake was not mutual; and none of them profess to proceed on the ground of mistake of law. There is, also, a decided conflict between them and the decision in *Brigham v. Brigham*, 1 Ves. Sr. 126, and Belt's Supp. 79. These cases come properly under the head of private rights defined by Lord Westbury as follows:

"It is said *ignorantia juris haud excusat*; but in that maxim the word 'jus' is used in the sense of denoting general law, the ordinary law of the country; but when the word 'jus' is used in the sense of denoting private right, that maxim has no application. Private right of ownership is matter of fact. It may be the result, also, of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded on a common mistake." *Cooper v. Phibbs*, 15 W. R. 1063; 2 L. R., H. L. Cas. 149.

There is, also, a class of cases sometimes cited as bearing on this question, which, in fact, stand not upon mere mistake of law, stripped of all other circumstances, but upon other and distinct grounds. Among these may be enumerated cases of compromise of doubtful rights. In *Naylor v. Winch*, 1 Sim. and Stu. 555, Vice-Chancellor Leach lays down the doctrine, that "if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of 'compromise,' a court of equity will relieve him from the effect of his mistake. But when a doubtful question arises, *** it is extremely

reasonable that parties should terminate their differences by dividing the stake between them in the proportion which may be agreed upon." See, also, *Gibbons v. Caunt*, 4 Ves. 894; *Stockley v. Stockley*, 1 Ves. & Bea. 23.

There is likewise a class of cases commonly classed under this head, which really have but slight bearing on the question. These are cases of family agreement to preserve family honor or family peace. See 1 Story's Eq. Jur. sec. 113, n. And, as has been said by Lord Eldon, in family arrangement, an equity is generally administered in equity, which is not applied to agreements generally: *Stockley v. Stockley*, 1 Ves. & B. 30. The principal cases of this character are *Gordon v. Gordon*, 3 Swanst. 400; *Dunnage v. White*, 1 id. 187; *Cann v. Cann*, 1 P. Wms. 723; *Stapilton v. Stapilton*, 1 Atk. 2; *Pullen v. Keady*, 2 id. 587; *Cory v. Cory*, 1 Ves. Sen. 19; *Clifton v. Cockburn*, 3 Myl. and K. 76; *Neal v. Neal*, 1 Keen. 672; *Frank v. Frank*, 1 Cas. in Ch. 84.

There are, also, cases where parties have done what it was not their purpose to do; or where they have not done what they did purpose to do, and in which relief is denied. A familiar illustration of the first of these mistakes is where two are bound by a bond, and the obligee releases one, supposing that the other will remain bound. In such case there is certainly nothing inequitable in the obligor's availing himself of his legal rights; nor of the other obligor's insisting upon his release. See 1 Story's Eq. Jurisp. 124. An illustration of the second of these mistakes is where the parties would have introduced into their agreement a certain clause, but omitted it from an erroneous impression as to the effect of its insertion: See *Innam v. Child*, 1 Bro. Ch. 92; *Cockerell v. Cholmeley*, 1 Russ. and Myl. 418.

The case of *Platt v. Bromage*, 24 L. J., N. S., Ex. 63, is the most recent English case we have been able to find on the subject. There the plaintiff, to secure advances made to him by the defendant, assigned to him his present, and also his after-acquired, property; and the former being insufficient to pay the debt, the latter was sold with the assent of the debtor, who supposed that the assignment passed the after-acquired property. The action was to recover the proceeds of such after-acquired property, and judgment given for defendant. Pollock, C. B., said that the plaintiff, having assented to the act, could not recover, although it was proved that there was a mistake in point of law, or a mistake in point of fact. Park, B., thought he must be bound by a mistake of law, but that point was immaterial, as the jury were not satisfied that there was a mistake of law; and it was said that the debtor had done nothing but what he ought, in justice, to have done.

Having given the English cases which decide or contain dicta that mistakes of law are not the subject of relief, we will now refer briefly

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to the English cases holding a contrary doctrine.

We have already cited the case of *Chatfield v. Paxton*, the opinion of Chief Justice De Grey in *Farmen v. Arundel*, 2 W. Black., and of Lord Mansfield in *Bise v. Dickason*, 1 T. R. 285. It has been argued, with considerable force and plausibility, that Lord Ellenborough did not regard the rule laid down by him in *Bilbie v. Lumley*, ante, as of universal application; and *Parrott v. Parrott*, 14 East, 422, is cited to support the argument. In that case Mrs. Terrill had executed a deed appointing the disposition of certain property; but afterward, having made her will, referring to that deed, had cut off her name and seal from the deed, saying that the object of it was fully accomplished in her will. Lord Ellenborough, in delivering judgment, said: "Mrs. Terrill mistook either the contents of her will, which would be a mistake of fact, or its legal operation, which would be a mistake in law; and, in either case we think the mistake annulled the cancellation. And," he added, "that it being clearly established that a mistake in point of fact may destroy the effect of a cancellation, it seems difficult, upon principle, to say that a mistake in point of law should not have the same operation." Lord Ellenborough also refused to extend the doctrine to executory contracts, and held that a mistake of law was a defense to an action on a mere promise. *Herbert v. Campion*, 1 Camp. 184; see also, *Rogers v. Maylor*, Park. Ins. 168; *Christian v. Coimbe*, 2 Esp. 489. This doctrine is irreconcilable with that announced in *Stevens v. Lynch*, 12 East, 38. The case of *Ancher v. The Bank of England*, 2 Dougl. 637, is sometimes cited as an authority on this side. Nothing was said in the case about mistake, though there evidently was a mistake of law, and the decision must have proceeded mainly on the ground that it could be relieved against.

In *Landown v. Lansdown*, Moseley, 864, Lord Chancellor King is reported as saying that the maxim of the law *ignorantia juris non excusat* was in regard to the public; that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases. The accuracy of this report has been doubted, but it has never been impeached, and Chief Justice Marshall in *Hunt v. Rousmaniere*, 1 Pet. U. S. said of it, "that, as a case in which relief has been granted on a mistake in law, it cannot be entirely disregarded."

The case of *Brigham v. Brigham*, 1 Ves. Sen. 126, and Bell's Supp. 79, is an important case on this side. The plaintiff had purchased an estate which already belonged to him, under a mistake of law, and the court ordered the defendant to refund the money, holding that "there was a plain mistake, such as the court was warranted to relieve against." In *Pusey v. Desbouverie*, 3 P. Wms. 815, a daughter made her election to accept a legacy in lieu of her orphanage part in the estate, under the custom of London or otherwise. It appeared,

very clearly, that she did this under a mistake as to her legal rights, and Lord Chancellor Talbot said it seemed hard that a young woman should suffer for her ignorance of the law, or of the custom of London, or that the other side should take advantage of that ignorance, and ruled accordingly.

In *M'Carthy v. Decaix*, 2 Russ. and Myl. 614, where a husband had renounced all claim to his deceased wife's property, on the supposition that he had been legally divorced from her, and therefore not liable for her debts, Lord Chancellor Brougham said, "If a man does an act under ignorance, the removal of which might have made him come to a different determination, there is an end of the matter. What he has done, was done in ignorance of law, possibly of fact, but, in a case of this kind, that would be one and the same thing." The same learned judge in *Cliffin v. Cockburn*, 8 Myl. and Keen. 76, remarked, speaking of the distinction between error of law and error of fact: "The distinction is somewhat more easy to lay down in general terms than to follow out in particular cases, even as regards the application of the rule, admitting it to be a correct one, and I think I could, without much difficulty, put cases in which a court of justice, but especially a court of equity, would find it an extremely hard matter to hold by the rule and refuse to relieve against an error of law." And the master of rolls, Sir John Leach, in a later case, *Cockerell v. Cholmeley*, 1 Younge and Coll. 418, said that "no man can be held by any act of his to confirm a title, unless he was fully aware at the time, not only of the fact upon which the defect of title depends, but of the consequences in point of law; and here there is no proof that the defendant at the time of the acts referred to was aware of the law on the subject." We have already quoted the remark of the same judge in *Naylor v. Winch*. The principle that relief may be afforded in cases of mere mistakes of law is recognized, also, in the following cases: *Willan v. Willan*, 16 Ves. 72; *Onions v. Tyrer*, 1 P. Wms. 345; *Turner v. Turner*, 2 Rep. in Ch. 154; *Ecans v. Llewellyn*, 2 Bro. Ch. 150; *Edwards v. McLeary*, Coop. 807.

From this cursory examination, it is evident that the question cannot be regarded as settled by the English authorities. While the preponderance of such authorities seems to be against relieving mistakes of law, it will be discovered that many of them did not necessarily involve the question, and were either in fact decided, or might have been decided, upon other grounds. We believe that the true principle to be deduced from the cases *pro* and *con*, and one which strongly commends itself to our notions of right and justice, is that laid down by Lord Mansfield in *Bise v. Dickason*, 1 T. R. 285, namely: that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back. But when money is paid under a mistake,

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which there was no ground to claim in conscience, the party may recover it back again.

In another paper we shall endeavor to collect and examine the American authorities on the question.—*Albany Law Journal*.

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THE IMMORALITIES OF WILLS.

Man has a natural longing to perpetuate himself, his likes and his dislikes, his ambitions, his ideas. He dreads to have his name die out, and desires male offspring to keep it alive. If he is a link in a long unbroken chain of family, he shrinks at the reflection that he may be the last link; and hence arises the establishment of an inheritable order of nobility. Above all he clings to material possessions. It is a bitter thought to most men, that others shall pluck the fruit of the trees which they have planted, and thrive under the roofs which they have reared, and follow the North star in ships which they have built; and so one bestows his name on a forest or a graft of apples, another erects a block of houses and calls it after himself, and the third nails his name to the broad stern of a steamship. The desire exists in all; it is only a difference in measure. Napoleon desired to found a dynasty; Smith leaves his India-rubber business to his sons, and directs that the firm shall be Smith's Sons. In others the desire has more of philanthropy, but not much less of vanity; one founds a library and another endows a college, but both insist that their name shall be attached to the gift. Few persons can do even as simple a thing as give a book, without writing their name as donor on the fly-leaf.

Experience has taught man that sooner or later he must give up his possessions, but he clings to the power of controlling what he leaves behind him. He wants to have his way, and make others feel his power, even after he is dust. Like a trustee of long standing, he grows to consider the fund as his own. Instead of viewing his interest in the property which God has permitted him to accumulate, as usufructuary merely, he not only regards it as his own, but endeavors to impress the stamp of his ownership upon it after death. So, while his bones are slowly mouldering, and cattle crop the grass that springs from his dust, he still has a bone of contention among his descendants or beneficiaries, in the shape of an estate burdened with conditions, or loaded with intricate trusts. None but the lawyers call him blessed.

It has been a grave moral and legal question whether a man has a right to effect the disposition of his property by will. Political economists have differed on this subject. Shall I not do what I will with my own? asks one. But another replies, you have no more right to direct the course of your property after your death than to dictate the policy of government.

You are done with earthly societies, and all you had falls back into the common fund. Society listens to man's pleadings for posthumous power only in a measured degree. His right to make a will is everywhere attended by limitations, differing according to the form of the government or temperament of the people. In some countries the rule "first come first served" is adopted, and primogeniture obtains. In others the testator may give to whom he chooses, but not as long as he chooses—for not longer than two lives, for instance—on the theory that to control his estate for twice as long as he possessed it is a sufficient reward for getting it. In others, he is restricted in the objects of benefactions; for example, if he leave a wife or child he cannot give more than a certain proportion to religious or charitable uses. In all communities he is prohibited from depriving his wife of dower in his estate.

At first thought one would suppose that the law would care but little concerning the disposition of a man's body after death. The law sometimes hands the bony parts of malefactors over to the surgeons for the instruction of students and the warning of the evilly disposed. But if a man proposes to do this for himself by will, the law makes a great fuss, and even suggests that the idea argues insanity. It is related of Ziska, that, as his end drew near, he commanded that drums should be made of his skin, in order that, though dead, he might speak terror to his enemies; he would have made a complete drum corpse of himself. In the case of *Morgan v. Boys*, the testator devised his property to a stranger, wholly disinheriting the heir or next of kin, and directed that his executors should "cause some parts of his bowels to be converted into fiddle-strings, that others should be sublimed into smelling salts, and that the remainder of his body should be vetrified into lenses, for optical purposes." In a letter attached to his will the testator said: "The world may think this to be done in a spirit of singularity or whim, but I have a mortal aversion to funeral pomp, and I wish my body to be converted into purposes useful to mankind." The testator was shown to have conducted his affairs with great shrewdness and ability, and, so far from being imbecile, he had always been regarded by his associates through life as a person of indisputable capacity. Sir Herbert Jenner Fust regarded the proof as not sufficient to establish insanity, it amounting to nothing more than eccentricity, in his judgment. Judge Redfield, from whose work on wills I quote this case, remarks on it: "This must be regarded as a most charitable view of the testator's mental capacity, and one which an American jury would not be readily induced to adopt. *We do not insist that the mere absurdity and irreverence of the mode of bestowing his own body, as a sacrifice, to the interests of science and art, in so bald and lawful a mode, was to be regarded as plenary evidence of mental*

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aberration. But we have no hesitation in saying that a jury would be likely always to regard it in this light, in the case of an unnatural or unofficious testament. And we are not prepared to say it should not be so." (What! that a jury should find against evidence?) "The common sense instincts of a jury are very likely to lead them right in cases of this character. The man who has no more respect for himself or for Christian burial, than this will indicates, has no just claim to the regard or respect of others." With great deference for the learned writer, I must differ from him. How can the law refuse to execute a testator's will, so far as it is not unlawful or abhorrent to morals or contrary to public policy, unless the testator be proved to have been of unsound mind? Suppose, in addition to proof of his clear intellect, the objects of his bounty were unobjectionable or praiseworthy; suppose he should bequeath his estate to the American Bible Society, for instance; shall we defeat his will because he also gives his bones to the New York Medical College? Refuse to execute that portion of his will, perhaps, as against good morals and public policy, but don't pluck up the wheat with the tares. The disposition of this testator's remains was undoubtedly repugnant to men's finer feelings, but I must confess I see nothing improper in a great scientific man, like Agassiz, for example, bequeathing his skeleton to a university which he has done much to adorn. If he should die at sea it would be a much more sensible use of his bones than to give them to the fishes, although the latter might well consider such an event of poetic justice on one who has reduced so many of their tribe to skeletons.

When a man comes to me to have his will drawn, and proposes to make his bounty to his wife dependent on her "remaining his widow," I always feel an ardent desire to kick or otherwise evilly entreat that man. I am generally able to convert such a heathen. If I fail, my omission to act on my aforesaid muscular impulse is wholly owing to the restraining power of divine grace. A good thing for such men to remember is the golden rule: "Whatsoever ye would that others should do unto you, do ye even so unto them." Would they like to have their rich wives leave such wills behind them? The welkin would ring with their howls. That men can go out of life leaving such testamentary directions is an evidence of their desire to perpetuate their jealousy, as well as their memory and wealth. Of such it cannot be said,

"The good men do, lives after them;
The bad is oft interred with their bones."

Perhaps, quite probably, the very money so grudgingly bestowed came from the wife; indeed, it may have been given her by a former husband; or the wife may have earned it in teaching music or keeping a boarding house, and weekly handed it over to a mean-spirited

wretch of a husband, who never did an honest hour's work in his life, but having lived on his wife all his days, is bound that no other man shall ever have the like temptation. I have noticed that such men generally contrive to get their wives to sign off all their dower right in their life-time. So there is no inducement left for the poor creatures to be extravagant. Some communities have had the good sense and magnanimity to declare such devises void, as being in restraint of marriage, but New York has not arrived at that pitch of moral elevation yet. Our state has been the pioneer in all other reforms concerning the rights of married women, and now wives among us enjoy pecuniary privileges in a larger degree than in any other state, I believe, and in a larger degree than their husbands. Why then do we yet retain this heathenish concession to the jealousy of hateful husbands? In a community where the right of a wife to hold separate property is not recognized, there might be some pretext for sanctioning the practice, on the hackneyed argument that a second husband might waste the savings of the first; but where she is constituted equal to her husband in respect to rights of property, this reasoning fails. What right has any man to adjudge that his widow shall not marry again, or inflict a pecuniary penalty on her so doing? All the pious expressions that the language is capable of, cannot cover up the wickedness of such a provision. It is really blasphemous to invoke the name of God in favor of such a testament. God does not bless jealousy, envy, hatred, enforced celibacy. The spirit of such testamentary dispositions is well ridiculed in an old quatrain which I have carried in my memory for some years:

"In the name of God, amen:
My feather-bed to my wife, Jen:
Also my carpenter's saw and hammer;
Until she marries; then, God damn her!"

Only one degree less mean is the habit of wreaking posthumous vengeance on a disobedient child by "cutting him off with a shilling." One may possibly be excused for a hasty act of this sort, but when the deliberate judgment approves it and lets it stand, it argues a screw loose in the testator's moral machinery. While he is writing or reading the good words at the commencement of his will, why does he not recall sundry expressions of scripture: "Let not the sun go down upon my wrath;" "He that hath no rule over his own spirit, is like a city that is broken down and without walls;" "Vengeance is mine, I will repay, saith the Lord?" Undoubtedly cases occur where children prove permanently unworthy of parental benefaction. But I am speaking of the common cases, as, for example, where a daughter marries a man whom her father dislikes. Such a one came to me once to have his will drawn, or rather a man who proposed to cut his son off because he had married a woman whom the father did not approve. The old man was a plain farmer, who, when I asked his reason.

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for this course, replied: "Well, I haint got nothing again the gal partikler, only she's a schoolmarm." "Well, what of that?" "Why, she don't know nothing about housekeeping!" It was evident that it might have been beneficial to the old man if he had fallen in with a schoolmarm in his young days. What a world this would be, now, if children were compelled to marry as their parents should dictate! How much it would add to conjugal fidelity and happiness! Look at France, where such marriages are substantially the rule. It would become necessary to erect a divorce court at once, with a large number of judges, to relieve each other. Another frequent excuse for disherison, is moral misconduct of a child, especially of a daughter. Fathers ought to be extremely deliberate in such a decision. If Christ could pardon Magdalen, a father may pardon his erring daughter. Especially when he cannot say that her straying is not the result of inherited passions or of defective moral teaching. "Let him that is without sin among you cast the first stone." How humiliated ought such a father to feel, when perhaps he is in the habit of sinning, under the promptings of his passions, every month of his life! During the prevalence of negro slavery in this country, I noticed that the men who were the most fearful of the consequences of "amalgamation" and loudest in their denunciations of it, were usually those who held the closest associations with females of African descent. So, I believe, the men who are the most "sensitive" about the honor of their wives and daughters, and most apt to go temporarily crazy, and shoot people, are those who practically have least regard for the honor of other men's wives and daughters.

Even when a man has no claims of family upon him, he can hardly be content with making good gifts in secret; he must proclaim them. An amusing instance of a man's pride and piety living after him may be found in *Downing v. Marshall*, 23 New York, 336. This was an action to obtain a construction of a will. The testator, an excellent and pious man, was a manufacturer of cotton goods, on whose adventures the Lord had smiled, and whose wealth consequently loomed up in large proportions. Being one of the earliest and most extensive manufacturers in the country, and justly proud of his material success, and being also childless and without kin on this side of the ocean, he resolved at once to perpetuate his name and commemorate that liberality toward charitable and religious objects for which he had always been remarkable. So, with the help of an attorney, he concocted and left behind him, as a beneficial fund for half a score of lawyers, one of the most singular wills that ever entered into the heart of man to conceive. His scheme was, in a word, to have his executors carry on his manufacturing business for the benefit of religious and charitable corporations! He left his manufacturing establishment to his executors in trust to carry on the

same and divide the profits in certain proportions between the American Tract Society, the American Home Missionary Society, the American Bible Society, and the Marshall Infirmary, the latter being a hospital which he had founded. But the architects of this remarkable scheme had heard that it was against our laws to tie up property for more than two lives, and so they provided that the trusts were to continue during the lives of two young men named in the will, and on their death the property was to be sold, and the proceeds were to be divided in the like proportion among the same beneficiaries. The court held the trust void, and that the estate descended to the next of kin, subject to the direction to sell and divide on the falling of the two lives. The court in effect decided that the business of the religious societies was the printing of tracts and Bibles, and not of cotton cloths; even religious pocket handkerchiefs, calculated for the meridian and intelligence of heathendom, would not answer. The Home Missionary Society, being unincorporated, did not participate in the benefits of the will in any degree. It took eight years and cost \$50,000 to establish the legal meaning of the will, which was a very different meaning from what the testator intended. Perhaps the result was designed by Providence as a rebuke, for the scheme which the testator had contrived to minister to his vanity, by carrying on his manufacturing establishment as long as legally possible after his death, was frustrated, while the purely benevolent objects alone were effected. His trust in Providence was approved; his trust in man was held void under the statute.

If there is not now, there some time will be, a special department in lunatic asylums for the treatment of lawyers who have become insane in the investigation of the law of charitable trusts and religious uses, and especially in the endeavor to ascertain what is at present the rule on these subjects in this state. I have too much regard for my own reason and that of my readers to attempt any analysis of the legal situation of these questions, but will offer a few suggestions upon them in a moral point of view, or rather a legal-moral point of view, for law and morals are so bound together that it is difficult to separate them.

Some philosophers teach that every human action, even if it have the semblance of charity, springs from selfishness. Thus, if I give a beggar a sixpence, it is not on account of the beggar, but because it confers pleasure on myself. This is a hard view of human nature, but has some plausibility. It could hardly be on this theory alone that a rich man impoverishes his family by giving his estate to found a church or an hospital. Some other influence must enter into the operation, such as fear. The church men have always had such powers of persuasion, that it has been found necessary to check them by legal restrictions. Poverty was inculcated to certain

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orders of monks, no doubt the better to fit them as beggars. At all events their begging has always been remarkably potent and attended by most remarkable responses. They have prevailed on moribund and wealthy sinners with as much certainty, if not by the same means, as the highwayman in the ballad on the coachman; who

"Put an ounce of lead in his nob
And purwailed on him to stop."

Swinburne, who is one of the most entertaining writers in the world, gives, in his treatise on wills, the case of a monk, who came to a dying gentleman, to make his will. The monk asked the gentleman if he would give such a manor and lordship to his monastery. The gentleman answered yea. Then if he would give such and such estates to such and such pious uses. The gentleman answered yea, to them all. The heir-at-law, observing the covetousness of the monk, and that all the estate would be given from him, asked the testator if the monk was not a very knave, who answered yea. And upon the trial, for the reason above said, it was adjudged no will. The New York legislature may have read or heard of this scene, for in 1848 they enacted that no testamentary gift to any benevolent, charitable, scientific, or missionary society or corporation shall be valid, unless the will be executed at least two months prior to the testator's death; and, if he leave a wife, child or parent, the gift shall be valid to the extent of one-quarter of his estate, but no more. In 1860 the extent to which such bequests are valid was enlarged to one-half the testator's estate, and literary and religious associations and corporations included within those provisions. This would have been an awkward provision for the benevolent gentleman who should desire to leave money to *portion deserv-ing old maids*,* and let his own daughters pine in single-cursedness for want of portions; and to the other person, with a nautical passion, who should yearn to set up a posthumous *life-boat*,* compelling his boys to "paddle their own canoe;" or to a third, who having been possessed in life by "the root of all evil," should, when death approached, contemplate bestowing his estate to plant a *botanical garden*,† leaving his daughters to fade as wall-flowers, and his sons, having sowed their wild oats, to go to seed in perjury; all of which testamentary schemes have been held to come within the definition of charitable. Such testators ought to remember and act upon the adage, "Charity begins at home."

Those who build up great religious trusts, to the exclusion of family, should think upon the scripture: "If any provide not for his own, and specially for them of his own house, he hath denied the faith, and is worse than an infidel." If one were to believe all the clergy

tell them, he must conclude that gifts to religion are the best pecuniary investments he can make in life. They tell us that the more money one gives away, the more money he will get in return. Now there are two objections to this argument of the church. First, it is a very sordid and mean appeal; and second, it is not true, in a pecuniary sense. "To him that *hath* shall be given." One should give to good objects according to his means, but let him not be urged by any such appeal to make an extravagant or disproportionate donation, however deserving the object. Let him not be seduced by those convenient blank forms of testamentary gifts, which the great religious publishing houses put forth on the covers of their publications. No matter how pure a man's motives, he has no right to ignore the claims of blood. It is possible that he may be absorbed by religious zeal to such an extent as to deny the faith which he would advance, and in his efforts to convert the heathen, he may become worse than an infidel.

When a man is about to die, he ought to forgive his enemies, but occasionally we find a will perpetuating the testator's spite and sense of earthly injuries. Such was Dr. Rowland Williams' recent will. The testator was a contributor to the famous volume of "Essays and Reviews," published in England some years ago, and author of the article therein entitled "Bunsen's Biblical Researches," on account of which he was prosecuted before the court of Arches, convicted and sentenced to suspension for one year—a sentence afterwards revoked. He was once professor in the College of St. David's, Lampeter, South Wales, but having some difficulty with the faculty, he exiled himself to a neighboring town, where he died, leaving in his will £50 to the town of Lampeter, one-third of the income of which is perpetually to be given to the town crier "for making proclamation once a year, about midsummer, on a market day, that I, Rowland Williams, never consented to the election of George Lewellin to a scholarship in this college, but in this as in other things I was foully slandered by men in high places; because I loved righteousness and hated iniquity; therefore, I died in exile; but while unjust men permitted me, I kept both the needy student by his right, and defended the alms of the altar of God." It remains to be seen whether this direction will be executed. Should it be approved, it would become a bad precedent, for scores of men might adopt the same peculiar expedient for perpetuating their censure, and it would thus result in a *crying evil*. Market day alone would not suffice, nor midsummer's heats, but every day, Sundays not excepted, summer and winter, would be vocal with the uncherubic officials, who continually would cry.

The last thing that is done to a man is to build a monument over his remains. A few thoughts on bequests for such purposes will form a fitting close to this paper. The topic

* Stat. 43 Eliz. ch. 4.

* Johnson v. Swan, 3 Madd. 457.

† Townley v. Bedell, 6 Ves. 194.

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has been suggested to my mind by the testament of a distinguished soldier, recently deceased, in which there is a bequest of \$50,000 for a mortuary monument. It has been held that the erection of a monument to perpetuate the memory of the donor is not a *charitable* purpose: *Melick v. President of the Asylum*, 1 Sack. 180. The question arises, is such a bequest to be applauded, even if sustained in courts of law? Can it answer any useful purpose? Is it not a monument to the testator's vanity? A monument at Thermopylæ or Bunker Hill, commemorating a great event, and erected by a grateful people, incites the beholder to patriotism. A monument to an individual, even, provided it springs from the gratitude of others, is an appropriate offering. But is it not better to leave the erection of such a monument to that grateful people or those mourning relatives? Of course I am speaking of very costly erections. How is such a bequest defensible in morals, when Lazarus, with his sores unhealed, may lie at the foot of the costly pile, and houseless wretches may cower under its shelter to escape the north wind? Let the great equestrian statue be set up, then; it will only serve to remind the moralist of posthumous pride that goes on horseback, while living poverty hobbles a-foot.

On reading the foregoing it strikes me that it is not strictly "humorous." It sounds more like a sermon. But a sermon on legal matters is a humorous idea, and it may go for what it is worth, as humorous or serious.—*Albany Law Journal*.

CANADA REPORTS.

COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law.)

CAISSE V. THARP.

BANK OF MONTREAL, *Garnishee*.

Attachment of debts.

A sum of money was sent by a father to his son, the judgment debtor, as a gift, through a bank. Before any communication by the bank to the judgment debtor, the execution creditor obtained an attaching order and summons to pay over. The order was issued on the 17th of August, thirteen days before the bank agency, where the debtor resided, was advised of the deposit.

Held, that the amount could not be attached.

Semle, that the father might revoke the gift, and therefore it could not be looked upon as a debt.

[Chambers, Sept. 9, 12, 1870.—*Mr. Dalton*.]

The execution creditor in this case obtained an order attaching a sum of money alleged to be standing to the credit of the execution debtor, in the agency of the Bank of Montreal at Cobourg.

The proper name of the execution debtor was Frederick S. G. Tharp, but he was sued as Frederick J. G. Tharp, and the money was said to be payable to one J. G. Thorp.

The money had been sent from England by the father to his son, the execution debtor, but there had been no communication between the Bank and the execution debtor on the subject.

O'Brien, for the execution debtor, showed cause:

1. The garnishees are a foreign corporation, and a debt cannot be attached in their hands. *Lundy v. Dickson*, 6 U. C. L. J. 91.

2. There is no debt in fact. The sum of money, even if intended for this debtor, is a gift from the father, and has never been claimed by the son, nor has there been acquiescence by him. The son could not sue the Bank for the money, and the father could recall it.

Order for the garnishees.

Dr. McMichael, for the execution creditor, supported the summons, contending that there was a debt, which could be attached.

Mr. DALTON.—I notice only one of the objections made in this case. The judgment creditor is required by the statute to show that "some person is indebted" to the judgment debtor. It is conclusively established that in such an application there must be a *legal* debt from the garnishee.

The facts shown in the case are as follows: The manager of the Bank of Montreal at Cobourg was notified, on the 30th August last, by the manager at Montreal, that the Cobourg agency was credited by the principal Bank at Montreal with \$389 83, on account of one J. G. Thorp, deposited in the Union Bank of London, in England.

I think it appears that the person named is the judgment debtor, and I take it, on the affidavits, that the money had been deposited for him as a gift from his father: that on the same 30th day of August, "immediately after" the manager was advised of such credit, he was served with this garnishing order and summons. The order was issued on the 17th August, thirteen days before the Bank at Cobourg was advised of the deposit, and probably before it had been received by the Bank at Montreal. It does not appear when that was. Then surely no debt was shown when the order was issued. But suppose the order not to have been issued till after the receipt by the Cobourg agency, no communication had been made to the judgment debtor by the Bank, nor even an entry to his credit (so far as shown) in their books; and if any point is clear at law, I should say it is clear that the depositor in this case could revoke the authority to the Bank to pay the judgment debtor, at any time, until something had occurred to create a privity between him and the Bank.

As to whether the Bank could be made garnishees in this proceeding, I do not say anything.

The attaching order and summons to pay over must be discharged, with costs to the garnishees.

Order accordingly.

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IN RE WATTS AND IN RE EMERY.

[C. L. Cham.]

IN RE WATTS AND IN RE EMERY.

Conviction—Sale of liquor contrary to by-law—27 & 28 Vic. cap. 18—32 Vic. cap. 32 (Ont.)—Certiorari—Appeal.

The above persons were convicted of selling intoxicating liquors without license, in a township where the sale of intoxicating liquors and the issue of licenses were prohibited, under the Temperance Act of 1864, 27 & 28 Vic. cap. 18, and a memorandum of the conviction, simply stating it to have been a conviction for selling liquor without a license, was given by the justices to the accused.

An application for writs of certiorari to remove the convictions for the purpose of quashing them was refused; for even if the conviction should have been under the Temperance Act of 1864, and not under 32 Vic. cap. 32 (Ont.), it was amendable.

Quære, whether the conviction could not be supported as it stood.

Semble, that although 27 & 28 Vic. cap. 18, sec. 36, takes away the right of certiorari and appeal, a certiorari may be had when there is an absence of jurisdiction in the convicting justice, or a conviction on its face defective in substance, but not otherwise.

[Chambers, Sept. 12, 1870.—Gwynne, J.]

These were applications for writs of certiorari to remove two several convictions, whereby the above named parties were respectively convicted of selling liquors in the township of Ernestown without a license.

The applications were supported by affidavits showing the summonses, which charged that the accused "did within the last twenty days sell or dispose of intoxicating liquors without the license required by law so to do, and contrary to the by-law of the corporation of the township of Ernestown, prohibiting the sale of intoxicating liquor in Ernestown;" and a memorandum dated 30th July, 1870, which was signed by the convicting magistrates, whereby it was said that after hearing the evidence, they adjudged that each of the above parties respectively is guilty of selling intoxicating liquors in the township of Ernestown without a license within the last twenty days.

There were also affidavits showing that by-law No. 1, of the year 1870, passed by the Municipal Council of the township of Ernestown, on the 17th January, 1870, whereby the sale of intoxicating liquors, and the issue of licenses for the purpose, is prohibited within the township of Ernestown, under the authority of the Temperance Act of 1864 (27 & 28 Vic. cap. 18). The affidavits show this to be a valid and subsisting by-law, and that it was brought under the notice of the magistrates at the hearing of the respective charges.

The ground of the application was that the memorandum of the justices showed the convictions to have been under the statute of Ontario, 32 Vic. cap. 32, whereas it was contended that the conviction should have been under the Act of 1864, 27 & 28 Vic. cap. 18.

McKenzie, Q. C., for the convicting justices and the prosecutor, shewed cause.

Holmsted supported the application.

GWYNNE, J.—The point made in favor of the applicants is, that a person cannot be convicted of selling intoxicating or spirituous liquors without a license in the township of Ernestown, because, by reason of the by-law, the issuing of such license is prohibited.

In my opinion, there is nothing in these cases to justify the issuing the writ. The statute of Ontario, 32 Vic. c. 32, s. 1, enacts that "no person shall sell by retail any spirituous, fermented or other manufactured liquors, within the Province

of Ontario, without having first obtained a license authorizing him so to do," as provided by the act. The act provides that these licenses shall be issued upon the certificate of the clerks of the respective municipalities, which were empowered to pass by-laws for granting the certificates, and for declaring the terms and conditions upon which the licenses shall issue.

Now, assuming a complaint to be made for selling spirituous liquors without a license, I am not at all prepared to say that a conviction which finds that the accused is guilty of that offence is bad because he may have adduced evidence which shows not only that he sold the spirituous liquors without a license, but that he could not have obtained a license, because its issue was prohibited by a by-law.

Since the passing of 32 Vic. cap. 32, any sale of intoxicating liquors is in effect illegal as made without license, unless the accused has the protection not only of a license, but also of a by-law of the municipality authorizing the same. Why may not, then, a person be convicted under 32 Vic. cap. 32, for selling without a license, when the accused produces a by-law prohibiting instead of authorizing the issue of a license?

I am not at all prepared to say that there is anything in the point made, even if the magistrates had conclusively prepared and returned their conviction in the terms of their memorandum; but it is said that in fact they have returned a conviction which sets out the by-law and convicts the parties of selling liquor in violation of the by-law.

However, whether this be so in fact or not, I do not enquire; because it is quite apparent that the charge against the accused was of selling liquor without any legal warrant to do so, and in fact in defiance of a law forbidding it. Now, in whatever form the magistrates may have expressed their conviction of that offence, I apprehend, if an appeal be not taken away, that the conviction would be amendable under 29 & 30 Vic. cap. 50, that is, that the charge which was before the magistrate should have to be heard on the merits, "notwithstanding any defect of form or otherwise in the conviction," and, if necessary, upon the party complained against being found guilty, the conviction would be amended, so as to conform with the facts adduced. The matter then, if appeal be not taken away, being capable of being amended on appeal, I do not think that a certiorari should issue. But whether the conviction be under 32 Vic. cap. 32, or 27 & 28 Vic. cap. 18, there is no appeal from this conviction to any court. Now, it would be defeating the object of the statute if, notwithstanding they declare that there shall be no appeal, still a party should be permitted to remove a conviction for the purpose of quashing it in respect of a matter not appearing upon the conviction itself to be a defect rendering it bad, and which, if the appeal had not been taken away, would have been rectified on an appeal.

I do not think that these writs of certiorari should be granted, except in cases where there appears to be an absence of jurisdiction in the convicting justice, or a conviction, upon the face of it, defective in substance.

Here the applicants in substance admit that they have sold the spirituous liquors contrary to

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SINCLAIR V. CHISHOLM—THE QUEEN V. WARBURTON.

[Eng. Rep.]

law; that is, without having such a license as made the act of sale legal. Under these circumstances, I see no way in which they can be prejudiced by the form of the conviction, whatever it may be, even though it be in terms for selling without a license contrary to 32 Vic. cap. 32; and I therefore discharge the summonses with costs, to be paid by the respective applicants, Watts and Emery, to the parties called upon to show cause.

Application refused with costs.

SINCLAIR V. CHISHOLM.

Special endorsement.

A writ of summons was specially endorsed for interest on the balance of an account, and for protest charges on an unaccepted draft.

Held, that the endorsement was right as to the interest, but not as to protest charges.

Bank of Montreal v. Harrison, 4 Prac. R. 381, explained.

[Chambers, Sept. 15, 1870.—*Mr. Dalton*.]

This was a motion to set aside a judgment for irregularity.

The writ of summons was specially endorsed for the price of

30,000 bushels of wheat.....	\$24,600 00
Less paid.....	23,977 00

Balance	623 00
Expense of draft protested..	1 32

\$624 32

And the plaintiff claimed interest on the latter amount from the 1st June, 1870.

Judgment was signed on default of appearance for the \$624 32, and interest.

It was objected that the interest and the expense of protest were not properly the subject of a special endorsement.

Harrison, Q. C., showed cause.

Dr. McMichael contra.

MR. DALTON.—First as to the interest. *Smart v. The Niagara Railway Co.*, 12 U. C. C. P. 404, is exactly in point, to show that this endorsement is warranted as to the interest. The Chief Justice says (p. 406), "It has become so settled a practice to allow interest on all accounts after the proper time for payment has gone by, and particularly upon the balance of an account, which imports that the accounts on each side are made up and only the difference claimed, that I do not think we should treat the claim for interest as vitiating the special endorsement; and I feel the less inclined to interfere because the objection is patent on the face of the roll, and a writ of error will therefore lie." That case governs this, though it is true that upon a reference to the Master, he could not allow the interest on such a claim, though a jury could give it.

Then as to the claim for the expense of protest. It is to be observed that this protest is for non-acceptance, and is very like the noting referred to in *Rogers v. Hunt*, 10 Ex. 474. The plaintiff could only recover this item upon a special count, showing a contract to accept, authorizing his draft, and is in the nature of unliquidated damages. It is not like the case of

a special endorsement for the amount of a bill or note, and for the expenses of protest for non-payment, in which case the endorsement of the cost of protest would be good: *Con. Stat. U. C. cap. 42, sec. 14*.

The case of *The Bank of Montreal v. Harrison*, 4 Prac. Rep. 381, when examined, is really a decision, so far as the present point is concerned, that the plaintiff might appropriate payments in a particular way, and nothing more. I have referred to the judgment papers, and the endorsement is simply for \$391 11, the balance due on a bill of exchange, which was surely good.

I do not think it can possibly be held that this sum of \$1 32 could be specially endorsed, nor can it be waived.

The judgment must be set aside, upon payment of 5s. costs—the defendant to bring no action.

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CROWN CASES RESERVED.

THE QUEEN V. WARBURTON.

Conspiracy—Combination to do a civil wrong—Attempt to defraud partner by falsifying accounts.

On an indictment for conspiracy, it is not essential that the combination should have been to do an act which, if done by one alone, would have been a criminal offence, but it may be enough that it would have effected a civil wrong.

The prisoner and L. being partners, the prisoner gave notice for a dissolution of the partnership. On the dissolution, an account was to be taken, and the property to be divided in certain proportions between the prisoner and L. The prisoner agreed with W. (who was manager of a branch of the business) and P. to make it appear, by documents purporting to have passed between W. and P., and by entries in the partnership books made by W., that P. was a creditor of the firm, and that certain partnership property was to be withdrawn and handed to P., so as to be divided between the prisoner W. and P., to the exclusion of L.

The prisoner was indicted for conspiracy with W. and P. to cheat and defraud L. The facts upon which the indictment was founded took place before the passing of 31 & 32 Vic. cap. 116, which makes a partner who steals partnership property liable to conviction as if he was not a partner.

Held, that the agreement was a conspiracy, for which the prisoner could be convicted.

[C. C. R., 19 W. R. 165.]

Case stated by Brett, J.

The prisoner, James Warburton, was tried before me at the summer assizes held in 1870, for the West Riding of Yorkshire and Leeds, upon a charge of conspiracy. The indictment charged, among other counts, that the prisoner had unlawfully conspired with one Joseph Warburton and one W. H. Pepys, by divers subtle means and devices, to cheat and defraud the prosecutor, S. C. Lister.

It appeared in evidence that the prisoner and Lister were, in 1864, in partnership, and carried on a part of the partnership business at Urbigau in Saxony, by there selling patent machines; that the prisoner had given notice, according to the terms of the partnership agreement, for a dissolution of the partnership between himself and Lister; and that upon such dissolution an account was to be taken, according to the partnership agreement, of the partnership property; and that according to it, such property would be divided, on such dissolution, in certain propor-

tions between the prisoner and Lister, after payment of partnership liabilities; and that the prisoner, in order to cheat Lister, had agreed with his brother, Joseph Warburton, who managed the partnership business at Urbigau, and with W. H. Peyps, a friend of the prisoner residing at Cologne, to make it appear by documents, purporting to have passed between Peyps and Joseph Warburton, and by entries in the partnership books or accounts, made under the superintendence of Joseph Warburton, that Peyps was a creditor to the firm for moneys advanced, and that by reason of such documents and entries certain partnership property was to be withdrawn and to be handed to Peyps, or otherwise abstracted or kept back, so as to be divided between the prisoner and Joseph Warburton and Peyps, to the exclusion of Lister from any interest or advantage in or from or in respect of it. The jury upon this evidence found the prisoner guilty of the conspiracy charged, and I think rightly so found, if, in point of law, such an agreement, made by a partner with such an intent to defraud his partner of partnership property, and to exclude him entirely from any interest in or advantage from it on such an occasion, that is to say, on the taking of an account for the purpose of dividing the partnership property on a dissolution of the partnership, by means of false entries in the partnership books, and false documents purporting to have passed with a supposed creditor of the firm, is a conspiracy contrary to law, for which a prisoner can be criminally convicted.

The offence, if it be one, was fully committed and completed before the passing of the statute, by which a partner can be criminally convicted for feloniously stealing partnership property.

I request the opinion of the Court of Criminal Appeal whether the verdict found in this case upon the evidence so stated, assuming such verdict to be correct in point of fact, can be sustained so as to support a conviction for conspiracy in point of law. If it can be, the conviction to be affirmed; if it cannot, the conviction to be set aside. I reserved the sentence to be passed on the prisoner.

Waddy (Whittaker with him) for the prisoner. There is no conspiracy, unless there is a combination by two or more to do an illegal act, or to do a legal act by illegal means, and both those elements are wanting in the present case. The transaction for which the prisoner was indicted was complete before 81 & 82 Vic. cap. 116 came into force. By that act, a partner who steals or embezzles any of the partnership effects is made liable to conviction as if he was not a partner; but apart from that act, there would be no illegality in dealing with partnership property as was done by the prisoner, and he has at most been guilty of an immoral act. In 2 Lindley on Partnership, 856, it is said that there is no method by which an ordinary firm can sue or be sued by any of its members, either at law or in equity, and that follows from this—"1. That no action at law can be brought by one partner against another for the recovery of money or property payable to the firm, as distinguished from the partner suing. 2. That no criminal prosecution is sustainable by one partner against another for what he may do with the property of the firm." The case of *B. v. Evans*, 11 W. R. 126, 9 Jur.

N. S. 184, is then cited, where a partner who misrepresented the partnership accounts, and thereby obtained more than his share of the property, was held not liable to conviction for obtaining money by false pretences. This case was decided upon the ground that the prisoner only obtained his own, that is to say, the partnership property, and the present case is on all fours with it. [BRETT, J.—Here there was to be no result of the fraud till after the dissolution of partnership, and the effect of the prisoner's act would have been to obtain not his own, but his partner's property.] [COCKBURN, C. J.—There was a conspiracy to do something which, when it took effect, would be an illegal act in every sense of the word. The criminality of a combination must be judged of by its result if carried out.] The prisoner was guilty of no actionable wrong; and an act which, if done by one alone, is not actionable, cannot be ground for an indictment for conspiracy when done by two or more. Buller, J., giving judgment in *Pasley v. Freeman*, 3 T. R. 61, says, p. 68, "If one man alone be guilty of an offence which, if practised by two, would be the subject of an indictment for conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured." Here the prisoner had not ceased to be a partner, and there was no time at which he would have been liable to an action for reparation of damages.

Maule, Q. C. (Nathan with him) for the prosecution, was not called upon.

COCKBURN, C. J.—I am of opinion that this conviction was right. It may be that the law of England goes further than that of other countries in holding that an act which, if done by one alone, would not make him liable to the criminal law, may become an indictable offence if carried out by two or more acting in combination; but, if that be so, the present case is most certainly not one in which I should desire to restrict the operation of the law.

The prisoner is indicted for having unlawfully conspired with others to cheat and defraud his partner. The offence charged was committed before the passing of the statute 81 & 82 Vic. cap. 116, and it has been contended, on the part of the prisoner, that because the act, if committed by him alone, would not have been a criminal offence, he cannot be convicted; and further, that if it is enough, for the purpose of this prosecution, that the prisoner should have committed an illegal act, it must be illegal in the sense of being actionable, and that that element is also wanting. I cannot agree with the argument that the act must of necessity have been a criminal act, if done by one alone, and I think it may, under some circumstances, be enough if the act is unlawful, in the sense that it is a civil wrong. It appears to me that it is not material whether the conspiracy had reference to a dissolution of partnership, or to the share which each partner would take on a division of present profit. The intent would in either case be an equal wrong to the other partner, tending to deprive him of his share of the profits, or of the partnership property. It is clear that that would be a civil injury, and would be within the ordinary definition of conspiracy or combination of two or more to wrong another by fraud and false pretences. It

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was a conspiracy during the existence of the partnership to do something which, upon its taking effect, would be illegal in every sense of the word; and assuming for the present purpose that no action would have been brought, there would certainly have been an equitable remedy on the dissolution of the partnership. I think that the facts of this case bring it within the principle of the authorities which have decided that an act not criminal in one person acting alone, may become so if carried out by two or more acting in combination.

Conviction affirmed.

COMMON PLEAS.

THE GREAT WESTERN RAILWAY CO., *Appellants*;
TALLEY, *Respondent*.

Railway company—Common carrier—Passenger's luggage—Negligence of passenger.

A passenger by the G. W. Railway from Cheltenham to Reading took his portmanteau into the carriage with him at Swindon. Having left the train for refreshment, he failed to find his carriage, and continued his journey in another carriage. When the train arrived in London, the portmanteau was found in the carriage in which it had been placed at Cheltenham, but it had been cut open, and the contents were gone.

In an action by the passenger against the company for the value of the articles, the jury found that there had been negligence on the plaintiff's part, but not on that of the company.

Held, that the general liability of the company was, under the circumstances, modified by the implied condition that the passengers should use reasonable care, and that as the loss was due to his neglect alone, the verdict was to be entered for the company.

[C. P., 19 W. R. 154.]

This was an appeal from the judgment of the County Court. The action was tried in the Marylebone County Court on the 5th of October, 1869, and a verdict was given for the respondent for £16 10s. A new trial was subsequently granted, and such new trial came on for hearing on the 1st of December, 1869, before the deputy judge and a jury.

The following is a statement of the particulars of claim:—For that the defendants were carriers of passengers and their luggage from Cheltenham to Reading, and that the defendants, on the 27th day of March, A.D. 1868, promised for reward paid to them by the petitioner in that behalf, to carry the petitioner and his luggage safely and securely from Cheltenham to Reading, yet the defendants did not so convey the petitioner's luggage safely and securely, but entirely made default in so doing, whereby the petitioner was deprived of the said luggage, and was put to much trouble and expense in endeavouring to obtain the same, and in providing other goods in the place of the said luggage, and the petitioner claims £18.

At the trial of the action the following facts were proved:—The respondent (the petitioner in the county court action) on the 26th of March, took an ordinary first-class return ticket from Reading to Cheltenham and back. Reading is a station on the Great Western original main line, as authorised to be constructed by an Act of Parliament (5 & 6 Will. 4, c. 107), and Cheltenham is also a station belonging to the Great Western Railway Company, and the railway from Cheltenham to Swindon (on the main line) was

authorised to be constructed by 6 Will. 4, c. 77. The respondent, in time for the 6.50 train on the 27th of March, went to the Cheltenham station, and on arriving at the station he handed his portmanteau to the guard and got into a first-class carriage, and the guard placed the portmanteau under the seat of the carriage. Plaintiff travelled safely with his portmanteau to Swindon, and on arriving at that station, he got out for the purpose of taking some refreshment, ten minutes being the time allowed by the company's printed regulations for that purpose. Four other passengers had travelled in the same carriage with the petitioner, who all got out at the same time for a like purpose.

The respondent was away for nearly ten minutes at the refreshment room, and on his return to the platform he was unable to find the carriage, which, with all the first-class carriages that came from Cheltenham, had, in his absence, and without intimation to him, been shunted on to the main line, as carriages usually are at Swindon station. It was sworn by the plaintiff that, upon making immediate inquiries of the guard, he was informed that the carriage he had occupied was not going on, and that his luggage had been removed into the van. He further alleged that he continued to remonstrate with the guard, and eventually, having delayed the train some minutes, entered another carriage.

Vale, the guard from Cheltenham to Swindon, denied the plaintiff's statement that he had informed him the carriage was not going on, and his luggage was removed into the van. He swore that when spoken to by the plaintiff about the loss, he pointed to the carriage in which the portmanteau was, the doors of which were not locked.

The plaintiff did not recognise the carriage as the one he had travelled in, and the guard did not go with the plaintiff to where it stood, because he feared ill treatment from some of the passengers, who had travelled to Swindon in some of the shunted carriages. The guard further proved that the carriages had been shunted by one of the company's servants, not called at the trial, and that no extra servants had been employed at the station on that night, in consequence of which (it being a full train returning from Cheltenham races) the train was delayed ten minutes beyond its proper time there; and that he told Mr. Talley two of the carriages were not going on to London.

All the first-class carriages by the train in question, except two, which had joined the train from South Wales and had not come from Cheltenham, went up to London by the same train as respondent quitted at Reading, and on arriving in London the portmanteau was found by Farquharson, the guard, who joined the train at Swindon, in Vale's place, and who proved finding it in one of the carriages from Cheltenham; but it had, however, been cut open, and the following portion of its contents had been abstracted:—Field-glass, £7; spurs, £1; overcoat, £3; sundries, 15s; books, 10s.; portmanteau, 15s.; money, £3 10s.; making a total of £16 10s.; leaving a pair of hunting-boots and other articles which, with the portmanteau, were duly returned to the plaintiff.

At the conclusion of the respondent's case, the

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judge was requested by the appellant's attorney to direct a non-suit, on the ground that there was no evidence that respondent had entrusted the portmanteau to the care of the appellants, and on the ground that there was evidence of contributory negligence on the part of the plaintiff. It was thereupon contended by the plaintiff's counsel, that if it was an action of contract, the doctrine of contributory negligence did not apply; and that if it were an action of tort, any private Act of Parliament limiting the liability of the court could not, under rule 96 of the County Court Rules and Orders, be given in evidence. It was admitted and agreed to by the defendant's attorney, that this action was to be treated as an action of contract entirely.

The judge declined to nonsuit the plaintiff, and received the defendant's evidence, and upon the whole case, subject to the objection of the plaintiff's counsel, that the question of contributory negligence should not be left to the jury, the verdict of the jury was taken by the judge in answer to the five following written questions, with further explanations by the judge:

1. Was there a delivery to the Great Western Company's servant, or porter, at Cheltenham station, by the plaintiff on his arrival there?

2. Was there such an assumption of personal control of the portmanteau, when delivered into the carriage at the plaintiff's desire, as to amount to an entire resumption by him of liability?

3. If so, was there at Swindon a fresh undertaking of liability on the part of the defendants?

4. Was there a want of due diligence on the part of the defendants' servants at Swindon, when their attention was called to the loss of the portmanteau?

5. Did the plaintiff, by his negligence, contribute to the loss of the portmanteau?

The jury answered the first three questions in the affirmative, the 4th in the negative; and to the 5th, replied—Yes. Thereupon both the appellants and respondent claimed the verdict. The judge directed a verdict to be entered for the respondent for £16 10s., the amount claimed, and granted leave to the defendants to appeal.

In further explanation of the fourth question, the judge also asked the jury broadly, whether there was at Swindon any negligence on the part of the appellants.

A further question was raised at the trial, upon which the opinion of the court was requested, should they, upon the above state of facts, consider that the respondent was entitled to the verdict; but should the court be of opinion that the appellants were entitled to the verdict, this further question will not be necessary.

The 169th section of 5 & 6 Will. 4, c. 107, and the 169th section of 6 Will. 4, c. 77, is as follows:

"And be it further enacted, that without extra charge it shall be lawful for every passenger travelling upon or along the said railway to take with him his articles of clothing not exceeding 40lbs. in weight and four cubic feet in dimensions, and the said company shall in no case be in any way liable or responsible for the safe carriage or custody of or for any loss of or injury to any articles, matters, or things whatsoever carried along or upon the said railway with, or

accompanying the person of, or belonging to, any passenger, or delivered for the purpose of being carried, other than and except such passenger's articles of clothing, not exceeding the weight and dimensions aforesaid. Provided always that nothing herein contained shall in any case extend, or be deemed or construed to extend, to charge, or make liable the said company further or in any other case than where, according to the laws of this realm for the time being, stage coach proprietors and common carriers would be liable, nor shall anything herein contained extend, or be deemed or construed to extend, in any degree to deprive the said company of any protection or privilege which either now or at any time hereafter common carriers or stage coach proprietors have or may have, but the said company shall from time to time and at all times have and be entitled to the benefit of every such protection and privilege."

The company's time bills contain the following regulation:

"Luggage.—First-class passengers are allowed 120lbs.; second-class passengers, 100lbs.; and third-class passengers, 60lbs. of personal luggage only, free of charge. All excess will be charged for according to distance."

"Children paying half-fare are allowed half the above quantity of luggage. All excess will be charged for according to distance. Passengers are requested to see the company's label placed upon each article of their luggage, otherwise it will not be put into the train."

"In order to prevent delay and inconvenience on the re-delivery of luggage at the end of the journey, passengers are requested to place on each article their name and address. And notice is hereby given that the company will not be responsible for the care of the same unless booked and paid for."

It was contended on the part of the appellants that the Act of Parliament limited their liability to articles of clothing, and could not be affected by the regulations; and if such regulation was valid and binding the company would, by the concluding paragraph, be released from all liability whatever.

For the respondent, who gave the regulation in evidence, it was contended that he would be entitled by it to carry personal luggage, and the company would be liable for it, notwithstanding the Act of Parliament recited above. It was further contended that the appellants were rendered liable for personal luggage by the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, s. 7.

It is admitted that the great coat, the sundries, and the portmanteau itself, amounting in value to £4 10s., are articles of clothing within the meaning of the recited Act, for the value of which the company is liable if their liability is limited to articles of clothing only, subject to the opinion of the court upon the respondent's claim to have the spurs included.

The questions for the opinion of the court are,

1. Should the judge have directed the respondent to be non-suited?

2. Should the question of the plaintiff's contributory negligence have been left to the jury?

3. Should the verdict upon the finding of the jury have been entered for the appellants or respondent?

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4. If the court are of opinion that the verdict upon such finding should have been entered for the respondent, then to what amount not less than £4 10s. ought it to be reduced so as to be in accordance with the Act of Parliament?

Paine (Lopes, Q.C. with him) argued for the appellants.

Finney for the respondent.

The cases and the arguments are set out in the judgment.

Cur. adv. vult.

Nov. 11.—*WILKES, J.*, delivered the judgment of himself, *KEATING*, and *SMITH, JJ.*—This was an appeal from the judgment of the county court in favor of the respondent, who was the plaintiff below. The plaintiff, a passenger by the defendants' railway, upon a return journey from Cheltenham to Reading, had his portmanteau put into the same carriage with him. At Swindon the train stopped, as usual, for ten minutes, the plaintiff got out for refreshment, and upon returning, failed to find his carriage, which however, in fact, continued in the train until it reached Paddington. He continued his journey from Swindon in another carriage of the same train, and afterwards obtained his portmanteau minus a portion of its contents, which had been stolen by some person in the carriage after he had left it at Swindon, and before its arrival in London. This action was thereupon brought to recover the value of the missing articles. There was contradictory evidence as to what passed at Swindon, and especially as to the circumstances which led to the plaintiff getting into another carriage, and so becoming separated from his luggage. The jury must be taken to have believed the evidence of the company in preference to that of the plaintiff, for they negatived any negligence on the part of the company's servants, and found that the plaintiff, by his negligence, contributed to the loss. This latter finding also shows that the jury must have adopted, as the more probable conclusion, that the theft took place between Swindon and London, so that the portmanteau would have been safe under the plaintiff's protection, had he regained the carriage. Notwithstanding these findings of the jury, the verdict was, by the direction of the judge, entered for the plaintiff, with leave to appeal, whereupon this appeal was brought. The law laid down by *Chambre, J.*, in *Robinson v. Dunmore*, 2 B. & P. 419, as to stage coaches, has been considered by eminent authorities to be, in general, equally applicable to railway carriages, viz., that "if a man travel in a stage coach and take his portmanteau with him, though he had his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost;" *Richards v. The London, Brighton and South Coast Railway Co.*, 7 C. B. 839; *Butcher v. The London & South Western Railway Co.*, 3 Com. Law Rep. 805, 16 C. B. 18; *Le Couteur v. The London & South Western Railway Co.*, 6 B. & S. 961; though it has been questioned by equally high authority whether the liability in respect to passengers' luggage is as stringent as that in respect of the ordinary carriage of goods, and whether there be any larger obligation in respect of goods carried with passengers than in respect

of the passengers themselves, to whom they are accessory: *Stewart v. The London & North Western Railway Co.*, 3 H. & C. 185, 189; *Munster v. The South Eastern Railway Co.*, 4 C. B. N. S. 701; and it should be remarked that in the case of *Butcher v. The London & South Western, and Le Couteur v. The London & South Western Railway Co.*, there was evidence of negligence on the part of the company's servants. Whatever may be the correct solution of this question, it is obvious at least that with respect to articles which are not put in the usual luggage van, and of which the entire control is not given to the carriers, but which are placed in the carriage in which the passenger travels, so that he, and not the company's servants, has *de facto* the entire control of them while the carriage is moving, the amount of care and diligence reasonably necessary for their safe conveyance is in fact considerably modified by the circumstance of their having been during that part of the journey in which the passenger might under ordinary circumstances be expected to be in the carriage, intended by both parties to be under his personal inspection and care. To such a state of things the rule which binds common carriers absolutely to ensure the safe delivery of the goods, except against the act of God or the Queen's enemies, whatever may be the negligence of the passenger himself, has never, that we are aware of, been applied.

If the passenger packed up articles liable to ignition by friction, and by the shaking of the carriage they caught fire—if a passenger were to look on while his luggage was being taken away or rifled when he might reasonably be expected to interfere—if he were to expose small articles of apparent great value in a conspicuous part of the carriage and leave them there whilst he unreasonably absented himself, and they were in consequence purloined—he would have no more just reason for complaint against the carrier, than if he had on some false alarm thrown his property out of the carriage window. The latter case, equally as the former, would in terms be out of the exception of the act of God or the Queen's enemies, and the rule especially affecting the liability of common carriers, if construed literally, and without regard to the reason upon upon which it is founded, would prevail. There is great force in the argument that where articles are placed, with the assent of the passenger, in the same carriage with him, and so in fact remain in his own control and possession, the wide liability of a common carrier which is found on the bailment of the goods to him, and his being entrusted with the entire possession of them should not attach, because the reasons which are the foundation of the liability do not exist. In such cases, the obligation to take reasonable care seems naturally to arise, so that when a loss occurred it would fall on the company only in the case of negligence in some part of the duty which pertained to them.

There is, moreover, a general principle applicable to these as to all bailments, namely, that the bailee shall not be heard to complain of loss occasioned by his own fault; and the loss in this case was so occasioned, and without such fault would not have taken place. In truth, the expression, "contributory negligence," in such a

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case, is inaccurate, if it implies any negligence on the part of the company, all the negligence having flowed from one source, namely, the conduct of the passenger, and the whole loss having been occasioned thereby. The verdict is, that the company's servants were not negligent, and the passenger was, and that by his negligence he contributed to the loss, the other contributory thereto being the thief to whom such negligence gave the temptation and the opportunity. The question, apart from the more general one, as to the extent of liability for passenger luggage, is thus reduced to whether there was any sufficient evidence to justify the jury in finding that the loss was occasioned by the passenger's negligence in the sense of neglect of duty; whether, in fact, the passenger, as between him and the company, assumed any duty in respect of the portmanteau, for in the absence of duty there could be no negligence such as to affect his remedy against the company. Upon this we are of opinion that the jury were justified in inferring from the circumstances of the portmanteau being put, with the passenger's assent, and of course for his convenience, into the carriage in which he was to travel, and so out of the immediate and active control of the company's servants instead of the ordinary luggage van, where it would have been under such control, that it was intended by both parties, and was an implied term of the contract of carriage, that in return for the convenience of having his luggage at hand, the passenger should during the journey take such reasonable care of his own property as might be expected from an ordinary prudent man, and should not by his negligence expose it to more than the ordinary risk of luggage carried in a passenger carriage, and that the finding of negligence in not using such reasonable care was sustained by the evidence.

This is enough to dispose of the case, but it may be proper to say a word on the questions left to the jury, and their answers as to the delivery of the goods, and the responsibility successively assumed by the company and the plaintiff. The first, finding that there was a delivery to the servants of the company, decides nothing as to the terms of the delivery; the second, finding that there was such an assumption of personal control of the portmanteau when delivered into the carriage at the plaintiff's desire, as to amount to an entire resumption by him of his liability, and the finding that if so there was at Swindon a fresh undertaking of liability on the part of the defendants, appears to be inconsistent; for if the plaintiff, upon getting his luggage into the carriage, resumed the entire liability, he could not cast it back upon the company by his own neglect; and in strictness, perhaps, the latter finding ought to be rejected, leaving the former conclusive against the plaintiff. We do not, however, proceed upon this ground, seeing that the question which led to the former finding involved matter of law, as to which the plaintiff ought not to be concluded by the verdict. Had the case turned upon this point, we might have thought it necessary to direct a new trial. Upon the ground first explained, however, namely, that the general liability of the company was, under the circumstances, modified by the implied condition that the passenger should use reasonable

care, and that the loss was caused by his neglect to do so, and would not have happened without such neglect, we think the judgment of the county court ought to be reversed, and the verdict entered for the defendants. The costs must follow the event.

Judgment for the appellants.

McDONOUGH v. BROPHY.

Practice—Computation of time—Exclusion of Sundays—Construction of the Common Law Procedure Act (Ireland) 1870 (33 and 34 Vict. c. 109), s. 6.

33 & 34 Vict. c. 109, is to be read together with the Common Law Procedure Act (Ireland), 1853, and consequently the eight days mentioned in section 6 of 33 & 34 Vict. c. 109, within which an application may be made to remit an action to the Civil Bill Court, are exclusive of Sundays, as provided by section 232 of the Common Law Procedure Act (Ireland), 1853.

(C. P., Ireland, 19 W. R. 157.)

Application under 33 & 34 Vict. c. 109, s. 6, to remit for trial in the Civil Bill Court an action for slander. The section requires that such an application should be made within eight days from service of the summons and plaint. If Sundays were to be included in the eight days, the application was not within eight days.

G. Fitzgibbon for the defendant.—Sundays are not included in the eight days, and the application is therefore in time.

Purcell, Q.C., and *C. Coates*, opposed the motion.—Sundays are included in the eight days: *Brown v. Johnson*, 10 M. & W. 331; *Rowberry v. Morgan*, 2 W. R. 431, 9 Ex. 780; *Peacock*, appellant, *The Queen*, respondent, 6 W. R. 517, 4 C. B. N. S. 264; *The Queen v. Justices of Middlesex*, 7 Jur. 396. At common law Sunday is just like any other day. The Common Law Procedure Act, 1853 (16 & 17 Vict. c. 113), is not incorporated with 33 & 34 Vict. c. 109.

G. Fitzgibbon, in reply.—The whole question is whether the Act of 1853 is incorporated with the present Act. By section 232 of the Act of 1853 Sundays are not to be counted in legal proceedings. If Sundays and holidays are included in the eight days, it will be possible to evade the section altogether by bringing an action on the day before Christmas-day, and the seven following days being holidays. *Rowberry v. Morgan* was decided on the ground that the General Orders were not intended to interfere with the statute: *Smith v. Grant*, 6 Ir. Jur. 317, *Ferguson's Practice*, 23.

LAWSON, J.—I am of opinion that this application ought to be granted. The present Act and the Common Law Procedure Act of 1853 ought to be read together. The one is called an amendment of the other. I think the case must be governed by the 232nd section of the Common Law Procedure Act of 1853.

MORRIS, J.—I am of the same opinion, but at first I had considerable doubts about the question. The Common Law Procedure Act of 1856 dealt with nothing new. Yet it was expressly stated that it was a part of that of 1853. The Bills of Exchange Act (9 Geo. 4, c. 24), had a special section relating to holidays. In this Act the point is left to be decided. The consequence is that difficulties have arisen from what appear

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to be obvious objections. However, the question is decided by implication. Considering the extraordinary absurdities which would arise under the contrary construction, I think the two acts ought to be read together.

MONAHAN, C.J.—I also had considerable difficulty in arriving at a conclusion. I am of opinion that we must have regard to the nature of the Act. I think it impossible not to construe the two Acts together, since they must be regulated by the same terms of common law procedure.

Order granted.

EXCHEQUER CHAMBER.

DENHAM V. SPENCE.

Practice—Action against British subject residing abroad
—"Cause of action"—Common Law Procedure Act, 1852
(15 & 16 Vict. c. 76), ss. 18 and 19.

A marriage contract was entered into by the plaintiff and defendant abroad. The plaintiff came to England, and was there followed by the defendant. Immediately on his arrival in England, the defendant wrote to the plaintiff that he did not intend to fulfil the contract, and subsequently refused to marry the plaintiff.

A rule to set aside a suit issued against the defendant under section 18 of the Common Law Procedure Act, 1852, was refused by the court (Kelly, C. B., *dissentiente*).

Contra (per Kelly, C. B.), "Cause of action" means the whole and entire cause of action, both contract and breach.

Semble (per Martin, B.), a marriage contract creating a personal relation between the parties to it, is a continuing contract down to the time of its breach.

Siehell v. Borch, 12 W. R. 346, 2 H. & C. 954; *Allhusen v. Malgarejo*, 16 W. R. 854, L. R. 3 Q. B. 340; *Jackson v. Spittal*, 18 W. R. 1162, L. R. 5 C. P. 542, commented on.

[Ex. 19 W. R. 162.]

Motion for rule to show cause why writ and subsequent proceeding in the above action should not be set aside, on the ground that the cause of action, if any, did not arise within the jurisdiction of the superior courts, under section 18 of the Common Law Procedure Act, 1852. The said section enacts as follows:—

In case any defendant, being a British subject, residing out of the jurisdiction of the said superior courts, in any place except in Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons in the form contained in the Schedule A to this Act annexed, marked No 2, which writ shall bear the indorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the said superior courts; and the time for appearance by the defendant to such writ shall be regulated by the distance from England of the place where the defendant is residing; and it shall be lawful for the court or judge, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the said courts in order to defeat and delay his creditors; to direct, from time to time, that the plaintiff shall be at liberty to proceed in the action in such manner, and subject to such conditions as

to such court or judge may seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case; provided always that the plaintiff shall, and he is hereby required, to prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of inquiry, or before one of the masters of the said superior courts, in the manner hereinafter provided, according to the nature of the case, as such court or judges may direct, and the making such proof shall be a condition precedent to his obtaining judgment.

This was an action for breach of promise of marriage. The offer and acceptance of marriage were contained in letters which passed between the plaintiff and defendant at the time that the former was living in Calcutta and the latter at the Cape of Good Hope. The plaintiff came to England, whither she was followed by the defendant. When off Plymouth the defendant wrote a letter to the plaintiff, dated the 8th of April, in which he informed her of his intention not to fulfil his engagement. He subsequently refused to marry the plaintiff. The letter of the 8th of April, was posted in Plymouth, and received, in due course of post, by the plaintiff on the 9th of April.

Day, in support of the motion—The question turns on the construction of the words "a cause of action which arose within the jurisdiction or in respect of the breach of a contract made within the jurisdiction" of section 18 of the Common Law Procedure Act of 1852. The contract in this case was certainly made out of the jurisdiction, therefore the defendant is not within the latter part of the sentence, nor is he, I submit, within the meaning of the words "a cause of action which arose within the jurisdiction," for even admitting the breach to have occurred in England, "cause of action" means the whole cause of action, and embraces the contract as well as the breach; and the former was not subsisting at the time that the defendant landed in England, for he had broken it by letter before disembarking. The authorities are divided as to the construction of the words in question. In 1858, this court, *Fife v. Round*, 6 W. R. 282, held that the dishonour in England of a promissory note made and delivered to the plaintiff in France, but payable in England, was within the section. But in 1864, this court, in *Siehell v. Borch*, 12 W. R. 346, 2 H. & C. 954—where the defendant, a foreigner residing in Norway, there drew a bill of exchange on E., after endorsing it to D.'s order, sent it by post to D. in London, who endorsed it to the plaintiff—held that the cause of action did not arise within the jurisdiction. However, in 1865, in *Chapman v. Cottrell*, 18 W. R. 848, 8 H. & C. 865, 84 L. J. Ex. 186—where the defendant, a British subject residing in Florence, signed two promissory notes there as joint and several maker with his brother in London, to whom he sent them by post, and his brother thereupon signed the notes and delivered them to the payees in England—this court held that the "cause of action" had arisen within the jurisdiction; but this case is, it is submitted, distinguishable from that preceding it, as the defendant's contract was not complete until the notes were signed and delivered by his brother,

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a joint maker in England. In 1868, the Court of Queen's Bench, in *Althusen v. Margarejo*, 16 W. R. 854, L. R. 3 Q. B. 340, following *Sichel v. Borch*, held that "cause of action" must mean the whole cause of action; that is, all the facts which together constitute the plaintiff's right to maintain the action. This case has been chronologically, but not otherwise, followed by the case of *Jackson v. Spittal*, 18 W. R. 1162, L. R. 5 C. P. 542, where the Court of Common Pleas has held that "cause of action" is satisfied by the breach of a contract arising within the jurisdiction; but that case is clearly wrong, as it proceeds on the idea of an analogy existing between the present procedure and that of out-lawy. Now the foundation of the proceedings in out-lawy was that the defendant must be in the jurisdiction, while the procedure introduced by the Common Law Procedure Act, is directed against those who are beyond the jurisdiction. I therefore submit that on this review of the cases, the balance of the authority is in the defendant's favour, and cause of action must mean "whole cause of action."

Petheram against the motion—This was a continuing contract, and therefore both breach and contract were in England; but if the court is not of that opinion, then I submit that by "cause of action" is meant a substantial part of the cause of action, and that is the breach which it is admitted arose within the jurisdiction: Day's Common Law Procedure Act, 1852, 3rd edit. p. 18.

Cur. adv. vult.

Pigott, B.—I regret to say that there is a difference of opinion in this court, and as the other superior courts have also differed in the construction to be put upon the language of the Common Law Procedure Act, 1852, s. 18, of that section I am bound to express my opinion. The words which raise the difficulty are a cause of action which arise within the jurisdiction "or in respect of the breach of a contract made within the jurisdiction." In the case of *Sichel v. Borch* I did not then differ from the rest of the court, but contented myself with expressing my doubts as to the correctness of the decision of the court. The Court of Common Pleas, in the case of *Jackson v. Spittal*, have had this section under their consideration, and have affirmed those doubts. After full consideration, I adopt the language of the Common Pleas. The Legislature, no doubt, intended to give increased facilities to creditors against debtors who are out of the country, and for this I rely upon the words "or in respect of the breach of a contract made within the jurisdiction" being used in the alternative. The present case arises upon facts which were correctly stated by Mr. Day, and that statement of the facts was accepted as correct by the other side; what we now have to determine is the intention of the Legislature conveyed by the words "cause of action." Mr. Day contends that the meaning of the words is the whole cause of action or all the facts which together constitute the plaintiff's right to maintain the action. It seems to me that that is not the true meaning of the words, or the intention of the Legislature.

The expression "cause of action" means the breach of the contract. It is of course clear

that a contract can be broken, but the breach alone would—and I think does—satisfy the language of the Legislature, and that is, I think made clear by the words used in the section. To exemplify them—Suppose a contract made in China to deliver goods in England and the contract is broken by non-delivery, then I say, according to this section, a cause of action would arise in England. The Act was intended to be a remedial Act, and I don't think we ought to narrow the words which the Legislature has made use of.

MARTIN, B.—I am of the same opinion. I think that this writ was rightly issued. The words of the section are, "It shall be lawful for the court or judge upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction or in respect of the breach of a contract made within the jurisdiction to direct, &c." The facts of the case are very short.

It appears that the defendant wrote an offer of marriage from the Cape of Good Hope to the plaintiff at Calcutta, and she wrote from that place accepting his offer. She came to England; he followed her; but before landing at Plymouth wrote to her that he held himself disengaged from his promise. Now, in my opinion, there is this peculiarity in the contract of marriage that it is a continuing contract, and therefore when the parties were in England, the one being at London and the other at Plymouth, it seems to me that there was a valid contract in England, and then the defendant having broken the engagement it follows that a cause of action arose within the jurisdiction. We were pressed by the judgment of this court in the case of *Sichel v. Borch*, but I am not embarrassed by that, for I still adhere to that judgment. The circumstances of this case are easily distinguishable from those in *Sichel v. Borch*; there the defendant was a Norwegian, residing in Norway; he may never have been in this country in his life; he both drew and endorsed the bill on which he was sued in Norway. It would have been monstrous on account of the dishonour of the bill here to have held that there was a cause of action within our jurisdiction, I therefore think that *Sichel v. Borch* was decided rightly, and I would decide both that case and the present, as they have been decided, if I had to decide them again.

KELLY, C.B.—I entirely agree with my brother Pigott, in regretting that there is a difference of opinion in the court on the construction of this section. In my opinion, "the cause of action" really means the whole and entire cause of action, and not merely such an act as the non-acceptance or non-delivery of goods. I think it almost obvious that that expression must include the making of a contract as well as its breach. My brethren read the words, "cause of action," as if they were equivalent to breach of contract; but it appears to me obvious that that is not the meaning, for the words breach of contract are used immediately afterwards. To treat non-payment, non-appearance, or non-delivery of goods as a cause of action is a mistake, for such acts of themselves do not constitute a cause of action; that which makes them so is the contract, and without the contract there can be no

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DENHAM V. SPENCE—GENERAL CORRESPONDENCE.

cause of action at all. I think therefore in the first place, that as the contract was not made in England, no cause of action did in this case arise within the jurisdiction. Now, as to the words of the statute on which this question arises, they are—"it shall be lawful for a court or a judge, upon being satisfied by affidavit that there is a cause of action, which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction," &c. Now, the effect of the construction I put upon the words "cause of action" would be, that if in the case of a contract made abroad, say for the delivery of goods in England, that contract were broken by the non-delivery of goods in England, no cause of action would arise within the jurisdiction; but in the case of a contract made in England, there a cause of action would arise, although the breach of the contract be committed abroad; but if that construction be not right, why, it may be asked, did not the Legislature, if it intended that actions should be brought here for breaches of contracts arising in England, although the contracts were made abroad, use half a dozen more words, and plainly express such intention. It seems to me, therefore, that, quite irrespective of authority, the meaning of this section is clear and obvious. But when we look at the authorities, several of which are in this court, and which terminate with the case of *Sichel v. Borch*, I think the balance of authority is in favour of my view of this section. I also look upon the case of *Althusen v. Margarje*, decided in the Queen's Bench, as rightly decided. There it was expressly said that the cause of action means the whole or entire course of action. There it was expressly said that the cause of action means the whole or entire course of action. My brother Martin has dealt with this case in a way that I cannot accede to. He says that the contract continued until the plaintiff and defendant came into this country; but if that were the case the same might be said of every contract if the parties to it happened to come to England, and where such an event happened there would be no necessity for the Act. Then as to the case of *Jackson v. Spittal*, recently decided in the Common Pleas, I have looked through that case with great attention, and it seems to me that they have purposely adopted such a construction of the section as would extend the jurisdiction of the superior courts. But I think such a construction would prejudicially affect thousands of persons, and would work positive injustice; and therefore, with every respect for the decision of that court, and agreeing, as I do, that it is generally a sound rule to put such a construction on an Act of Parliament as should have the effect of extending the jurisdiction of the superior courts, I am unable, for the reasons I have given, to agree with that decision. I am therefore of opinion that in the case of a contract made abroad, but broken in England, the "whole cause of action" does not arise within our jurisdiction.

CLARKE, B. (after saying that although not in court during the whole of the case, he felt himself entitled to give judgment, as he had heard Mr. Day's argument, proceeded)—I agree with the majority of the court that the defendant's application ought to be refused. The ex-

pression "cause of action" is very intelligible, though if the words used had been "whole cause of action" that might not, perhaps, have been so clear. Now when does the cause of action arise? It seems to my mind clear that it arises when that is not done at the time at which it ought to have been done, and when that takes place in this country then it follows that the cause of action arises here, or, in other words, the cause of action arises when something takes place inconsistent with the obligations of the party; now that in contract is the breach, and therefore, I hold that the cause of action can arise nowhere except where the breach occurs. As to the inconvenience which my Lord Chief Baron suggests would arise from our holding that actions can be brought in this country in respect of contracts made abroad, but broken in England, I confess that it does not seem to me that any would arise, for such contracts would be interpreted according to the law of the country where they were made; yet, as the breach has occurred in England, it seems to me only fair and reasonable that the action should be brought in England. As to the case of contract made within but broken without the jurisdiction, if we expand the section it will read "or that there is cause of action in respect of the breach of a contract made within the jurisdiction," and the action, therefore, gives us jurisdiction over contracts made here, but of which the breach has arisen abroad.

Rule refused.

GENERAL CORRESPONDENCE.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Could you kindly give me an opinion as to whether a barrister can legally enter into a partnership with an attorney who is not a barrister, and hold themselves out to the world as a firm of attorneys. It seems to be an improper mode of procedure, but I cannot find any authority against it. *Query*, could they, suing as a firm, recover any fees?

By giving an opinion you will oblige,

Yours respectfully, ENQUIRER,

Guelph, December 2, 1870.

[We cannot say that there is anything illegal in the practice alluded to, nor even improper under certain circumstances, unless of course done from an improper motive or with intent to mislead clients or the public. It is very common for one member of a firm simply to do the counsel part of the work, and for the other to attend to the attorney's department, though both are responsible to the client. It would of course be very improper for the barrister to attempt to shield himself from this responsibility by the fact, probably un-

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known to the client, of his *not* being an attorney.

So far as the practical result is concerned, it would not be likely to make much difference to the client; the barrister, it may be assumed, would be at least as good a lawyer as the attorney, and it would be only in very extreme cases where the barrister partner would find it to his advantage, even if fraudulently inclined, to set up the fact that he was not what he pretended to be.

They could not recover fees as a firm of attorneys; proceedings would have to be taken in the name of the attorney alone.

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[We shall be glad to receive full information under this head, from reliable correspondents, so as to enable us to keep as complete and accurate a record as possible.]

THE HON. JOHN PRINCE, Q.C.

(Extracted from the *Essex Record*.)

The Honorable John Prince, late Judge of the district of Algoma, better known to the public as Col. Prince, was born in Herefordshire, England, on the 12th of March, 1796, and consequently upon his death at his residence at Sault Ste. Marie, Algoma, on the 30th of November, 1870, was in the 75th year of his age.

He was early in life devoted to the profession of the law, and in 1821 was admitted to practice in all the courts of law and equity in England. He followed the practice of his profession in the Counties of Herefordshire, Kent and Gloucestershire, until 1838, when he decided upon emigrating to America. His extraordinary fondness (amounting to a passion) for field sports, is said by those still living who remembered him at that time, to have been the cause of this sudden severance from a lucrative practice and all his home ties; it is said he would occupy all his leisure at this time in reading and dilating upon accounts of the deer and turkey shooting in Kentucky, which he then intended as his destination. Had he carried out his intention, with the knowledge we now have of him, and of the subsequent history of the country he proposed as his future home, a curious speculation might be formed as to the position of himself and family; but the facts were that his course was changed by the influence, we believe, of some accidental companions of voyage, and in August, 1838, he finally settled in Sandwich, two miles from where we write.

In 1835 he went into Parliament, and from this point of his career there were few men whose actions for twenty years after this time were more continually before the people of

Ontario and Quebec than those of Col. Prince. From 1836 to 1860, he sat in the Parliaments of Upper Canada and United Canada, and for the latter few years, in the Legislative Council or Upper House of the United Provinces, to which, when made elective, the electors of Essex and Kent, the "Western Division," returned as its representative the man who both counties always "delighted to honour." Colonel Prince was the representative of the Western country; but he was not merely a representative in the House of Parliament, for—whether he were urging to its passage a bill for the admission of aliens to the real estate privileges of British subjects, and thereby bringing American capital into the Province, or whether he were ordering the shooting on the spot of these same Americans when caught in the sin of piratical invasion and brutal murder, and thereby subjecting himself to abuses and misrepresentations, culminating in duels and court martials (and recent events have shewn his course to be the proper treatment of like marauding scoundrels after all), or whether he was arranging an agricultural show or cattle fair in a little Essex town on the plan of his old Herefordshire recollections, or haranguing in the principal city of Canada thousands on the then, to Conservatives, most exciting topic of the day, the payment of "rebellion losses," in all circumstances, on all occasions, he was the representative man.

He was called to the Bar and admitted as an attorney in Michaelmas Term, 1838, at the same time as the present Treasurer of the Society, and was elected a Benchman in the same term twenty years afterwards.

In 1860 he was offered and accepted the situation of District Judge of the District of Algoma, which he never quitted until the year 1870, when he visited Toronto in search of medical assistance which could not be of use, for he died suddenly on the morning of Wednesday, November 30, but quite calmly and free from pain.

As a lawyer he was a remarkable instance of a practical application of the maxim that law is the highest reason, the best of common sense; for, without being a student, he would almost instinctively seize upon the true bearing, and the inevitable result of a certain state of facts, and would astonish consumers of the midnight oil, by shewing that he knew the law without having read the cases.

As a politician he was successful as regards the interest of the country, an utter failure as regards his own. He would urge with the whole power of his intellect some measure he deemed for the good of the country, utterly indifferent to the fact that the ministry he professed to support at the time were its opponents. He never could be made to understand the necessity which seems now-a-days to be so universally admitted, the necessity for party government. He never held office.

As both lawyer and politician his distinguishing characteristic was his eloquence, elo-

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quence which would sometimes rise, especially in his references to the classics (for he was a scholar of old Hereford College, and no mere "crammer" of Latin and Greek), to the height of oratory. And with his eloquence, with the expression of his thoughts in the most fluent and fitting language, was joined almost all the advantages which subserve it, ease of manner, power and pliability of voice, and a most gracious and commanding presence. But the feature of Colonel Prince's character, upon which most of those who knew him well fixed their attention, was always his manliness, his independent assertion of not what always was right, but always what he thought to be so, and his generous and disinterested recantation of such opinions when he thought them to have been wrong.

His warm impulsive nature, fed by and resting upon a superb bodily constitution, led him to error as well as to truth, but in either event men came to know that what he did he did with all his heart, and that that heart was never sullied by anything mean, sordid, or dishonest.

Two biographical sketches of Colonel Prince have been published, one by Mr. F. Taylor, in 1863, another by Mrs. Jamieson, in the earlier portion of the Colonel's Parliamentary career, we think about 1838.

GEORGE A. CUMMING, ESQ.

(Extracted from the *British Whig*.)

George Alexander Cumming, Esq., Barrister-at-Law, an old and esteemed resident of Kingston, died on Wednesday, the 28th December last, in the fifty-eighth year of his age.

His father, John Cumming, Esq., was one of the first settlers in Kingston, and represented the then town in the Parliament of Upper Canada about the year 1826.

He first studied law in the office of the late George Mackenzie, and finished his studies with the late Mr. Thomas Kirkpatrick, Q. C., and was called to the bar in Michaelmas Term, 1837. His health, which was impaired by a severe accident in childhood, maiming him for life, would not permit him, however, to devote himself to the arduous duties of the practice of the law, to which otherwise, by his keen intellect and talent, he was admirably adapted.

In 1840 he was appointed Judge of the Surrogate Court of the United Counties of Frontenac, Lennox and Addington; but this office being subsequently merged in that of the Judge of the County Court, Mr. Cumming was necessarily obliged to resign. In 1864 he received the appointment which he held until the time of his death, namely, that of Registrar of the city of Kingston, in which office he was most invaluable—a link, as it were, connecting the present with the past.

The worthy Judge—for as "the Judge" he was best known—was universally esteemed. From his kind, gentle and generous disposi-

tion, he could not but be beloved; and we think we are safe in saying that since the death of his kinsman, the late Mr. Archibald J. Macdonell, not one has passed away from amongst us, whose death has caused more sincere regret, or whose memory will be longer cherished.

REVIEWS.

THE UNITED STATES JURIST. Washington, U.S.

A new monthly publication intended as a *multum in parvo*. The editor says: "We would seek to be in a measure a labor saving contrivance; and, instead of encumbering our columns with legal arguments and judicial opinions which may be found elsewhere, we would be content to present the leading principles, leaving our reader to pursue the investigation at his leisure."

The tendency of the age is towards superficial knowledge. No "labor saving machine" can make a good lawyer; though we may admit that it confers some benefits in these days of phrenzied haste.

APPOINTMENTS TO OFFICE.

COUNTY JUDGE.

THE HON. WALTER RAN McCREA, of the Town of Chatham, in the County of Kent, to be Judge of the Provisional Judicial District of Algoma, vice Hon. John Prince, deceased. (Gazetted December 24th, 1870.)

COUNTY ATTORNEY.

JOHN BAN McLELLAN, of the Town of Cornwall, Esquire, Barrister-at-Law, to be County Attorney and Clerk of the Peace for the United Counties of Stormont, Dundas and Glengary, vice James Bethune, resigned. (Gazetted December 3rd, 1870.)

DEPUTY CLERK OF CROWN.

FRANK E. MARCON, of Sandwich, Gentleman, Attorney-at-Law, to be Deputy Clerk of the Crown and Clerk of the County Court of the County of Essex. (Gazetted 1st October, 1870.)

WILLIAM ALEXANDER CAMPBELL, of the City of Toronto, Esquire, to be Acting Deputy Clerk of the Crown and Clerk of the County Court of the County of Kent, vice T. A. Ireland, deceased. (Gazetted 1st October, 1870.)

REGISTRAR.

JOHN COPELAND, of the Township of Cornwall, Esquire, to be Registrar for the County of Stormont, vice George Wood, resigned. (Gazetted November 19th, 1870.)

NOTARIES PUBLIC.

GEORGE FREDERICK HARMAN, of the Village of Orangeville, Esquire, Barrister-at-Law; THOS. DIXON, of the Village of Durham, Esq., Barrister-at-Law; ARCH. BELL, of the Town of Chatham, Gentleman, Attorney-at-Law. (Gazetted November 5th, 1870.)

FRANCIS R. BALL, of the Town of Woodstock, and EDWARD MERRILL, of the Town of Picton, Esquires, Barristers-at-Law. (Gazetted November 12th, 1870.)

SIMON HARRISON PAYNE, of Colborne, Gentleman, Attorney-at-Law. (Gazetted November 26th, 1870.)

JOHN HENRY GRASSETT HAGARTY, of the City of Toronto, Esquire, Barrister-at-Law. (Gazetted December 3rd, 1870.)

ADAM HENRY MEYERS, jun., of the City of Toronto, Esquire, Barrister-at-Law. (Gazetted Dec. 17th, 1870.)

ROBERT OLIVER, jun., of the Town of Guelph, Esq., Barrister-at-Law. (Gazetted December 24th, 1870.)

ALEXANDER S. WINCH, of the Town of Dundas, Gentleman, Attorney-at-Law. (Gazetted 31st December, 1870.)

RETAINERS AND RETAINING FEES.

DIARY FOR FEBRUARY.

1. Wed. Last day for Co. Trea. to furnish to Ck of Mun. In Co's list of lands liable to be sold for taxes. Assessors to complete rolls, unless time ext.
2. Thur. Examination of Law Students for call to the Bar with Honors.
3. Frid. Examination of Law Stud. for call to the Bar.
4. Sat. Exam. of Art. Clerks for certificate of fitness.
5. SUN. *Septuagesima Sunday*.
6. Mon. Hilary Term begins. Articled Clerks going up for inter-examination to file certificate.
8. Wed. Inter-examination Law Students and Articled Clerks. New Trial Day, Queen's Bench.
9. Thur. New Trial Day, Common Pleas. Last day for setting down and giving notice of re-hearing in Chancery.
10. Frid. Paper Day, Q. B. New Trial Day, C. P.
11. Sat. Paper Day, C. P. New Trial Day, Q. B.
12. SUN. *Sexagesima Sunday*.
13. Mon. Paper Day, Q. B. New Trial Day, C. P.
14. Tues. *St. Valentine*. Paper Day. C. P. New Trial Day, Q. B.
15. Wed. Paper Day, Q. B. New Trial Day, C. P.
16. Thur. Paper Day, C. P. Open Day, Q. B. Re-hearing Term in Chancery commences. Last day for service of summons for Co. Court, York.
17. Frid. New Trial Day, Q. B. Open Day, C. P.
18. Sat. Hilary Term ends. Open day.
19. SUN. *Quinquagesima Sunday*.
22. Wed. *Ash Wednesday*.
24. Frid. *St. Matthias*.
26. SUN. *1st Sunday in Lent*.
27. Mon. Last day for declaration County Court York.

THE

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RETAINERS AND RETAINING FEES.

SECOND PAPER.

In olden times counsellors dealt directly with the client, and a general retainer sometimes assumed the form of a grant by way of annuity *pro consilio impenso et impendendo* (Rolle's Abr. p. 435, pl. 10). In such a case the claim of the barrister for remuneration was a legal one, recoverable by suit. But in cases of special retainer, with a view to advocacy in litigation, the relationship of counsel and client precluded the making of any contract, so as to give the former a legal claim to compensation: *Kennedy v. Brown*, 13 C. B. N.S. 677. In other matters of counsel business, outside of the courts and not with a view to advocacy therein, it is necessary in order that a barrister may be able to recover his fees from a client that the client should have made an actual and express promise to pay them, inasmuch as nothing more than a moral obligation arises from the mere existence of the relation of counsel and client: *Mostyn v. Mostyn*, L. R. 5 Ch. Ap. 457.

In subsequent years it became, as it still continues, the customary etiquette to retain counsel through the medium of the solicitor or attorney in the particular suit: *Doe d. Bennet v. Hale*, 15 Q. B. 171. In such cases special retaining fees to counsel are always taxable between solicitor and client, and attorney and client, and there is even a case reported in which under extraordinary circumstances this item was allowed in a party and party taxation: *Nickells v. Halsam*, 9 Jur. 649. The solicitor under his general retainer is authorized to pay the counsel this and other fees, and after payment he can recover them from his client: *Morris v. Hunt*, 1 Chit. R. 544. Usage has established the course of dealing to be, that counsel is so employed by the solicitor not upon a preliminary traffic for his services in consideration of future payment, but upon a preliminary payment of his fees before those services are obtained: *Hobart v. Butler*, 9 Ir. C. L. R. p. 166. It may be noted (as Mr. Harrison has omitted it in his book) that in Ontario counsel fees are to a limited extent a legal claim and recoverable by action. This is by virtue of the enactment which is consolidated in section 332 of the Common Law Procedure Act and the tariff of costs framed in pursuance thereof, providing for counsel fees: *Baldwin v. Montgomery*, 1 U. C. R. 283; *Leslie v. Ball*, 22 U. C. R. 512.

The payment of retaining fees to attorneys and solicitors is a practice for which no modern English authority can be found, although there is reference made to such a fee in an anonymous case reported in 1 Salk. 87. (It is just possible that this may refer to the charge for drawing the retainer, which is taxable: *Browne v. Diggle*, 2 Chit. 812.) In the United States retaining fees to attorneys are sanctioned by the tariffs and claimable by law. It has been a usual practice in this Province to charge and in some cases to stipulate for such a fee, though some uncertainty exists as to its being taxable against the client when called in question. In an unreported case of *Eccles v. Carroll*, this practice was adverted to during the argument by Mowat, V. C., who said that in his time practitioners very often required a small fee, such as ten dollars, to be paid them at the commencement of a suit, with the view of covering the expense of miscellaneous non-taxable items during the progress of the cause.

RETAINERS AND RETAINING FEES—GENERAL SESSIONS OF THE PEACE.

A similar conventional charge in Ireland has been judicially recognized there, as "*oil for keeping the wheels going*." It is probable that the propriety of the charge in this view only was recognized by the court in *Chisholm v. Barnard*, 10 Gr. 479, where executors were allowed the payment of such a fee in the passing of their accounts as against the estate.

We have had occasion to notice a passage in McMillan on Costs, p. 73, which seems to be replete with errors on this point. He says, "The fee on a retainer is only allowed in bills between attorney and client, and is never taxed against the opposite party, except when he is ordered by the court to pay costs as between attorney and client. It is, however, an item which should never be allowed, except in actions of a very special nature, and where great difficulty is encountered. It should always be explained to the client when necessary, and the amount stated to him before he is asked to sign the retainer. It is moreover an item which should never be charged, even where proper, unless there be a *written* retainer to support it. This consists of a mere memorandum in writing, with the fee intended to be charged by the attorney included therein, and signed by the client." Now be it observed that this fee was expressly disallowed upon a taxation in alimony as between solicitor and client in *Cullen v. Cullen*, 2 Chan. Cham. R. 94, and there is no reported case where it has been taxed at all, when objected to by the client, but several cases the other way are to be found: see *Re Geddes*, 2 Chan. Cham. R. 447; *Re McBride*, *ib.* 163. There is no reason in laying it down as a principle that only in actions of a special nature should retaining fees be allowed; the theory of the non-chargeability of such fees in England is, that Term fees, which are taxed alike in all cases, stand in the stead thereof, so that if retainers are to be taxed upon sufficient evidence of the agreement to pay, they should be so taxed in every case. But in truth it may be said that such fees are not in strictness taxable in this country at all. The mere fact of the agreement being in writing has no such virtue as the author imputes to it: *Strange v. Brennan*, 15 Sim. 346; *Pines v. Beattie*, 32 L. J. Ch 784. It would seem contrary to the policy of our law relating to costs, as settled by statutes and tariffs, to permit of any such charge being made. The broad rule on this point is this

where there is a tariff of costs providing for the remuneration of lawyers, they shall not be allowed to bargain for any compensation beyond that: see *Philby v. Hazle*, 8 C. B. N.S. 647; 8 W. R. 611. In Hibernian phrase, if the practitioner wishes to have his retainer taxed he had better keep it out of his bill of costs. In this way he may defend himself in the retention of a *paid* retaining fee, and refuse to give credit for it in his bill of costs on the ground that it is a gratuity given him freely by his client, above and beyond the bill of costs to which he is legally entitled. To do this, however, he would require to prove the concurrence of a variety of things, which we rather think has never yet been accomplished in any case. For instance, it would have to be established that the client was distinctly informed, (1) that the tariff allows of no such charge; (2) and that although the solicitor bargaining may decline to conduct the client's suit without such a fee, yet that others of equal ability may be found who would conduct it upon the usual scale of allowances; (3) that such a charge could not in any event be recovered from "the other side;" and (4) generally that all the circumstances of the transaction were voluntary and fair, and with full warning to and perfect knowledge by the client of his position and rights.

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JURISDICTION IN CASES OF PERJURY.

Our attention has been called to the above subject by various articles that have lately appeared in our public papers, and by discussions that have taken place thereon. Upon looking into the matter, we are compelled to admit that it is a subject by no means free from doubt as to whether the Court of General Sessions of the Peace has power to try cases of perjury or not. We will endeavour, however, to give some idea of how the matter rests.

Our Act (Con. Stat. U. C. cap. 17) relating to General Sessions does not so much constitute a new Court, as continue and make valid the commissions and authority under which the Courts had been formerly holden, that is, prior to 41 Geo. III. It will be noticed that the County Courts, and some of the other Courts, have special acts, by which they were constituted Courts in Upper Canada; whereas, as mentioned before, Courts of Quarter Ses-

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sions were only confirmed and continued by the first act of our Legislature which specially refers to them. This being so, it becomes necessary to enquire under what authority were the Courts of General or Quarter Sessions in this country first held. We should say, by the act introducing the criminal law of England in this Province.

Now, our act respecting these Courts says nothing in reference to jurisdiction; in which case we must fall back on the English law, and ascertain what law governed the jurisdiction of Courts of General Sessions in England when the criminal law was introduced into this Province.

The Court of General or General Quarter Sessions of the Peace was established in England in the reign of Edward III, for the trial of felonies, and of those misdemeanors and other matters which justices of the peace, by virtue of their commission or otherwise, might lawfully hear and determine. The statute 24 Ed. III. cap. 1, states what offences may be tried by these Courts, and, after enumerating a large number of different classes of cases, goes on to say, "and to hear and determine all and singular the felonies, trespasses, &c., according to the law and statutes of England." There was some considerable doubt entertained as to what the words "felonies" and "trespasses" included, and what constructions ought to be placed upon them; but the authorities now seem to be agreed that, with the exception of *perjury at common law*, and *forgery at common law*, the Court of Quarter Sessions has jurisdiction of all felonies whatsoever—even murder (2 Hawk. P.C. cap. 8, sec. 68). It has been long ago settled that for *perjury at common law*, an indictment at the Quarter Sessions will not lie (see 2 Hawk. P.C. cap. 8, sec. 64; *R. v. Bainton*, 2 Str. 1088); but *perjury under the statute* 5 Eliz. cap. 9, is within the jurisdiction. In a case that came up before Lord Kenyon, C.J.: *R. v. Higgins*, 2 East. 5 (an indictment for soliciting a servant to steal goods from his master), it was argued that the case did not fall within the jurisdiction of the Sessions, but his Lordship said, "I am clearly of opinion that it is indictable at the Quarter Sessions, as falling within that class of offences which, being violations of the law of the land, have a tendency, it is said, to a breach of the peace, and are therefore cognizable by that jurisdic-

tion. Of this rule there are indeed two exceptions, namely, forgery and perjury;—why exceptions, I know not; but having been expressly so adjudged, I will not break through the rules of law." His Lordship, in referring to the above exceptions, no doubt alluded to the *common law* offences, perjury under the statute of Elizabeth not having been decided to be without the jurisdiction.

Such being the state of the law when it was introduced into this country, has the jurisdiction of the Sessions been diminished or changed by any Provincial act?

But before going further, we may mention that the English law has been altered by Imp. stat. 5 & 6 Vic. c. 38, s. 1, and the jurisdiction of the General Sessions greatly lessened. By that statute, among other crimes excepted from its jurisdiction, are the crimes of murder, perjury, subornation of perjury, forgery, &c.; but this statute having been passed long subsequent to the time when the English criminal law was introduced into Canada, does not affect our law on the subject. It may be said, from the fact of the crimes before mentioned being expressly excepted from the jurisdiction of the General Sessions, that the English Legislature considered that such crimes were not before then without the jurisdiction of these Courts; but this does not necessarily follow, as the law was very properly defined so as to prevent any doubt or uncertainty as to the jurisdiction.

If we, then, have no special enactment excepting these crimes, it would seem that, as regards them, the jurisdiction of General or General Quarter Sessions of the Peace still exists. The only act since the act first referred to (Con. Stat. U. C. cap. 17), bearing on the subject, is the act of 24 Vic. cap. 14, which abolishes the power of the Quarter Sessions to try treasons and felonies punishable with death. This act was, however, repealed by Dominion statute 32 & 33 Vic. cap. 36. The Dominion Act 32 & 33 Vic. cap. 29, sec. 12, withholds jurisdiction from the Sessions in cases of felony punishable with death, and libel; and cap. 21 withholds it in cases of fraud by agents, bankers, factors, trustees and public officers (*vide* sec. 92); and 32 & 33 Vic. cap. 20, in certain offences against the person, set forth in secs. 27, 28 & 29, withholds jurisdiction; so that, with these exceptions, the power of the Quarter Sessions is the same as before.

GENERAL SESSIONS OF THE PEACE—THE BENCHERS BILL.

It will be noticed that the Act respecting Perjury (Dom. stat. 32 & 33 Vic. cap. 23, sec. 6), empowers the judge, &c., to direct that any person guilty of perjury before him shall be prosecuted, "and to commit such person so directed to be prosecuted until the next term, sittings or session of *any Court having power to try for perjury.*" Now, the language of the English enactment 14 & 15 Vic. cap. 100, sec. 19, from which ours is taken, after providing that it shall and may be lawful for any judge, &c., to direct, &c., is as follows: "and to commit such person so directed to be prosecuted until the *next session of oyer and terminer or gaol delivery* for the county or district where," &c.; indicating that the jurisdiction over such cases in this country is not confined to the assizes only, as in England. From all which, we take the deduction to be, that in cases of perjury at common law, the Court of General Sessions of the Peace has no jurisdiction; in cases of perjury under the statute of Elizabeth (this statute relates to perjury by witnesses only) the Court has jurisdiction. In cases of forgery at common law, it has not jurisdiction: *R. v. Yarrington*, Salk. 406; *R. v. Gibbs*, 1 East. 178. As, however, the statute of Edward provides that if a case of difficulty arises upon the determination of the premises, that judgment shall in no-wise be given unless in the presence of one of the justices of one or the other Bench, or of one of the justices appointed to hold the assizes, it is not at all probable that the justices sitting in General Sessions will take upon themselves to determine crimes of the more serious nature, but will exercise the power above given them of allowing such crimes to remain over for the judge holding the assizes.

We do not feel that we have arrived at a very satisfactory conclusion—certainly not at the generally conceived idea; but in view of the premises, we can form no other opinion on the matter.

It is not improbable that the jurisdiction of the Court of General Sessions will soon be fully settled by a decision of one of the Superior Courts of Common Law, as we understand a case was reserved lately by one of the County judges, upon the ground that he had doubts, and desired to have the opinion of the Court of Queen's Bench as to whether or not the Courts of General Sessions have jurisdiction in cases of forgery.

THE BENCHERS BILL.

Some considerable alterations have been made in this Bill by the special committee to whom it was referred, as will appear from the extracts given below. The privilege proposed to be given to the silk gowns to elect twelve members from amongst themselves is taken away; the provisions as to electoral districts are struck out, and thirty Benchers are to be elected, irrespective of locality; length of standing at the Bar is not required, and the youngest barrister is as eligible as the leader of the Bar. The first election is to take place next April, if the Bill passes.

The clauses referred to provide that—

"On the first day of Easter Term, one thousand eight hundred and seventy-one, the present benchers, except as hereinafter provided, shall cease to hold office, and from and after that day the benchers of the Law Society, exclusive of *ex-officio* members, shall be thirty in number, to be elected as hereinafter provided.

For the purpose of the election of the remaining thirty benchers, each member of the Bar not hereinafter declared ineligible as an elector, may vote for thirty persons.

Such votes shall be given by closed voting papers, in the form in schedule A of this Act, or to the like effect, being delivered to the Secretary of the Law Society on the first Wednesday of April of the year proper for such election, or during the Monday and Tuesday immediately preceding: any voting papers received by the said Secretary by post during said days, or during the preceding week, shall be deemed as delivered to him.

The said voting papers shall, upon the Thursday following, be opened by the Secretary of the Law Society in the presence of the scrutineers, to be appointed as hereinafter mentioned, who shall scrutinize and count the votes, and keep a record thereof in a proper book, to be provided by the said Society.

The thirty persons who shall have the highest number of votes shall be benchers of the said Law Society for the next term.

Any person entitled to vote at such election shall be entitled to be present at the opening of the said voting papers.

In case of an equality of votes between two or more persons, which leaves the election of one or more of such benchers undecided, then the said scrutineers shall forthwith put into a ballot-box a number of papers, with the names of the candidates having such equality of votes written thereon, one for each candidate, and the Secre-

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tary of the said society shall draw by chance from such ballot box in the presence of the said scrutineers one or more of such papers sufficient to make up the required number, and the persons whose names are upon such papers so drawn shall be such benchers.

The persons so elected Benchers as aforesaid shall take office on the first day of Easter Term following their election, and shall hold office until the beginning of the Easter Term which shall be the fifth after they shall have entered on their said office, or till the election of their successors."

It has also been decided in committee that Benchers who shall be absent from Convocation for one year shall lose their seats.

By the Bill as introduced the County Judges were returning officers for the country districts, and this might have been thought to have rendered them ineligible as Benchers, but if that is all to be done away with, no such idea can arise, and so much the better, as there are some among them, take for example the Chairman and members of the Board of County Judges, who would make admirable Benchers. Hitherto it has not been the habit to appoint any of the County Judges, but with no sufficient reason that we can see, in fact there is much to be said in favor of appointing those of them who may be considered most eligible, and when this Act comes into force, which is now a foregone conclusion, we shall hope to see some of them elected.

The following is the Act introduced by Mr. Rykert to amend the Act to regulate the procedure of the Superior Courts of Common Law, and of the County Courts, as reprinted after the amendments made by the Special Committee:—

Her Majesty, &c., enacts as follows:

1. That sections one hundred and ten, one hundred and twelve, one hundred and thirteen, one hundred and fourteen, and one hundred and thirty, of chapter twenty-two of the Consolidated Statutes of Upper Canada, be and the same are hereby repealed.

2. That the costs of any issue, either of fact or of law, shall follow the finding or judgment on such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues, unless the judge at the trial shall certify to the contrary.

3. That in all actions brought in any of the County Courts of this Province, it shall be lawful for the Judge of the County Court where the proceedings are commenced, to change the venue according to the practice

now in force in the Superior Courts; and in the event of an order being obtained for that purpose, the clerk of the County Court where the action was commenced shall forthwith transmit all papers in the cause to the clerk of the county to which the venue is changed, and all subsequent proceedings shall be entered and carried on in said last mentioned county as if the proceeding had originally been commenced in such last mentioned court.

4. That section one hundred and nine be amended by adding to the end thereof the following: "Provided always that the Judge of the County Court shall have the power to grant such leave in cases brought in either of the Superior Courts when both the plaintiff's and defendant's attorney reside in the county where such action is commenced.

5. That section one hundred and twenty-nine be amended by adding to the end thereof the following words, "but this shall not apply to any action wherein the venue is laid in the County of York."

6. That in all actions of replevin the Judge of the County Court of the County where the goods are, which are sought to be replevied (excepting the County of York), shall have the power of issuing the order in the same manner as by law the Judges of the Superior Courts are empowered to issue the same.

7. That if any debtor in execution shall escape out of legal custody after the passing of this Act, the Sheriff, Bailiff, or other person having the custody of such debtor, shall be liable only to an action upon the case for damages sustained by the person or persons at whose suit such debtor was taken or imprisoned, and shall not be liable to any action for debt in consequence of such escape.

8. That it shall and may be lawful to plead any number of pleas, replications, avowries, cognizances or other pleadings without leave of the Court or a Judge; Provided always, that the opposite party shall be at liberty to apply to the Court or a Judge to disallow any plea upon the ground of embarrassment, or delay.

9. That the Judge at any trial shall at the request of either party cause the witnesses to be removed from the Court during such trial; and also the parties to the suit if in the discretion of the Judge it is deemed necessary; and any such witness who shall return to the Court without leave shall be liable to be punished in such manner as to the said Judge may seem proper; Provided always that the said Judge may in his discretion exclude the testimony of any witness who shall return to the Court without leave of the Judge.

10. In any case where on the trial leave is reserved to move to enter a non-suit, or to enter a verdict for the defendant, and the jury disagree and find no verdict, the court, on motion in Term pursuant to such leave, may give the same judgment as if a verdict had been found for the plaintiff.

11. Every writ of summons issued against a railway, telegraph, or express corporation,

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and all subsequent papers and proceedings in the event of an appearance not having been duly entered, may be served on the agent of such corporation, at any branch or agency thereof, or on any station master of any railway company, or on any telegraph operator, or on any express agent having charge of an express office, shall for the purpose of being served with a writ of summons issued against such corporation, or any paper or proceeding as aforesaid in the event of non-appearance, be deemed the agent thereof.

12. In all cases where pleadings or notices of trial or countermand of notice of trial in either of the Superior Courts of Common Law, or in the County Court, are served upon the agent of the Attorney in the cause in Toronto two clear additional days to the time now allowed by law for such service shall be added.

13. That section twenty-eight of chapter thirty-five of the Consolidated Statutes for Upper Canada be repealed and the following substituted therefor:

Upon the application of the party chargeable by such bill within such month any of the Superior Courts of Law or Equity or any Judge thereof, or any Judge of a County Court shall without money being brought into court refer the bill and the demand thereon to be taxed by the proper officer of any of the Courts in the county, in which any of the business charged for in such bill was done, and the Court or Judge making such reference shall restrain the bringing any suit for such demand pending the reference.

14. That the second section of the Act passed in the twenty-eighth year of Her Majesty's reign, chaptered nineteen, be amended by erasing the figure "4" in the fourth line of such section and substituting therefor the figure "9."

Some slight alterations have also been made in Committee of the House, which we shall refer to hereafter.

SELECTIONS.

DEFECTIVE STATE OF INTERNATIONAL LAW.*

It is much to be regretted that whilst proper remedies are available of a preventive, suppressive, and penal character, against crime, the ordinary disease of the body politic, there are no remedies either of a preventive, suppressive, or penal character against war, the highest and most pernicious crime in the commonwealth of nations, unless it be, indeed, its own condign retribution. It is supposed that International Law is able to subordinate the relations of States to the dictates of natural law, and that though nations acknowledge no superiors, they are yet under the same obligation mutually to practice honesty and humanity. But, alas, experience shows that

International Law is not able to effect its own noble mission. That law does indeed afford a standard of high maxims of right and justice, by which the acts of States may be judged, but fails altogether in the means of securing adherence thereto, and many are the acts which that law reprobates, that continue to be committed with the utmost impunity. Can nothing be done to place the public law of the civilised world on a firmer footing than it stands at present? Is there no mode for supplying the serious shortcomings of International Law?

The root of weakness in International Law is, that it is not a law. A law, in its special restricted sense, is a command or precept, emanating from some superior authority, and constituting a rule of action which an inferior is obliged to obey. Not so with International Law. That is only a body of principles or opinions enforced, not by physical but by moral sanctions. Nor is there much certainty or authority in the sources of such principles. Natural law, divine law, the reason of the thing, the customs of nations, the express agreements of States, the judgments of Prize Courts, the dicta of learned writers have each and all elements of weakness in them. Natural law is a sentiment rather than a principle. Divine law is unheeded by some, denied by others. The reason of the thing is often not very transparent in particular cases. The judgments of Prize Courts frequently reflect the opinions of the State under whom they are instituted. Treaties are easily disregarded or broken, and the statements of writers on the law of nations are often uncertain and conflicting.

Setting aside, however, these inherent defects, generally, we may say, International Law is composed of two elements, the natural and the conventional. The natural element is common to all nations. Like the *ius gentium* of the Romans, it embraces all those principles of morals which are implanted by the Author of Nature in the heart and mind of every one, of whatever clime or race, and which ought to regulate the acts of every individual of every State in their mutual relations. The duty of being faithful to one's engagements, or of acting in good faith, or of respecting the rights and property of others, are necessarily alike in every country, and are as binding on the State in its collective capacity as a moral person as on an individual. The conventional element of International Law is that which results from the practice of nations, from the judgments of their Prize Courts, and from express agreements or treaties. There are leading cases in the law of nations as in municipal law. The declarations made by ministers or ambassadors, the diplomatic correspondence, the conduct of States, constitute so many evidences of the positive obligations of States. But those two elements, the natural and the conventional, are often intermixed and often separate. There may indeed be a natural

* Recently read at the Social Science Congress.

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obligation where there is not a conventional, but there is scarcely a conventional without the natural element bound up with it. Unfortunately, however, of the two elements the natural, that which is the most unchangeable and universal, is also the less certain in its operations and authority. Could we give to the universal principles of natural law the same certainty as is possessed by the conventional, we should not have to lament the weakness and uncertainty which characterise by far the greater part of the law of nations. As it is, the structure of International Law is most defective and unsatisfactory. If, as according to some, the law of nations in reality consists of the practice of nations, for what practice, however unhallowed, can we not find ample precedents? If, as according to others, it consists only of the aspirations of philosophers and moralists, or of the dictates of natural or revealed religion, we have always the ready answer, that its principles, however wise and beneficent in theory, are not suitable in practice.

For many of the evils and difficulties which often disturb the intercourse of nations International Law is certainly not responsible. It is the political system that is at fault. It is from the defective organisation of States that the greatest troubles arise. International Law takes the States composing the great commonwealth of nations such as they are, but it cannot guarantee their permanent existence. Since the Treaty of Vienna, which was supposed to have settled the public law of Europe, and established a balance of power among its different States, Italy has become a kingdom, the German Confederation has been destroyed, the Republics of Frankfort and Cracow are extinct, Belgium is parted from Holland, and another Napoleon has reigned in France. Matters connected with the internal government of a State and matters relating to its external relations appertain to political science, and not to International Law, and in practice there is, alas, too great a difference between politics, which are too often prompted by the lust of power or expediency, and International Law, which proposes to set forth the dictates of eternal justice. In the relations of States in time of peace International Law enjoins the observance of all those duties which the safety of the general society requires, and commends the performance of those offices of humanity which may tend to the preservation and happiness of other States, and to promote their intelligence, power, and freedom; but how often the political system of States has been based on selfishness and exclusiveness. Nor would it be right to attempt to enforce what are simply moral duties, whether in international or social relations, for they are duties which do not produce corresponding rights, or rights which do not produce corresponding duties. It might be an act of enmity on the part of a State to refuse to trade with another, but no one could compel it to do so without

violating its own right of freedom. We had no more right to compel China to take our opium than China would have to compel us to receive her tea duty free.

It is, however, when we come to a state of war that the defective character of International Law becomes most apparent. Amongst the many works on the subject, Grotius's "*De Jure Belli ac Pacis*" holds certainly the first and highest rank, and this work was suggested, as he said, by the natural horror with which he beheld the frequency and atrocity of the wars in which every State was engaged on the most trifling pretext. "I have been for a long time convinced," he said, "that there is a God common to all nations, who watches both the preparation and the course of war. I have remarked, on all sides in the Christian world, such a wanton license as regards war, that even the most barbarous nations should blush for. People turn to arms without reason, and for the slightest object, and they trample under foot all Divine and human laws as if they were authorised, and were quite resolved to commit all sorts of crime without any check." Grotius wished to put a stop to such barbarism, and he conceived the thought of bringing the precepts of Scripture, as well as the dicta and sayings of philosophers and moralists, having a direct bearing on matters relating to peace and war, clearly before the civilised States of the world, in the hope that these might, by their own moral force, succeed in establishing a law which no civilised State might feel itself at liberty to disregard. That great influence was exercised by that and subsequent works on International Law is incontestible.

What we lament is, that whilst, on what may be considered insufficient and unsatisfactory ground, at least in that religious aspect in which Grotius first discussed the question, both he and the other principal writers of the law of nations declared that, under certain circumstances, war is lawful, neither Grotius, nor any other writer, sufficiently defined the precise circumstances under which war may be justifiable. Following the analogy of criminal law, Lord Bacon said:—"As the cause of a war ought to be just, so the justice of that cause ought to be evident, not obscure, not scrupulous; for, by the consent of all laws in capital cases, the evidence must be full and clear, and if so where one man's life is in question, what say we to a war which is even the sentence of death upon many?" It is, I conceive, too loose a statement to say that war is lawful to prevent or redress a wrong, to obtain a reparation against an injury committed or threatened, or for any act committed or expected to be committed affecting the independence of a State, or the free enjoyment of its rights. What, if the wrong be of a most trivial character? What, if the threat be imaginary and not real? Looking back to the ordinary cases of war, how few of them can be resolved into wars simply of self-defence!

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There have been wars of pillage, conquest, and domination, where the Cæsars, the Alexanders, and the Napoleon Bonapartes claimed an universal empire. There have been religious wars, as where the Greeks fought for their Temple in Delphis, where the Huguenots fought for their existence in France, and where Protestantism asserted its rights, arms in hand, in Germany. And there have been wars for the maintenance of a principle, as those of the French Revolution and the wars of Austria in Italy.

But the most prolific cause of war in modern times have been the balance of power and intervention, both of which infringe a cardinal principle of International Law, the principle of the sovereignty of States. What is the balance of power it is not easy to determine, but its object would seem to be so to distribute the forces of the different States, that none shall have the power to impose its will on, or oppress the independence of, any other State. Let any State extend its forces or multiply its resources beyond a certain limit, and according to that principle a cause is at once given to every other State to unite in checking this unwonted aggrandisement. Nor is this principle a simple theory, since the treaties of Westphalia, Utrecht, and Vienna, have, in effect, reduced it into positive law. But has not every State an absolute right to increase in power, forces, and wealth? Can we prevent the substantial sources of aggrandisement which lie in the superiority of race, in greater capacity for labour, and in the strength of higher morals? The power of a State does not consist merely in the extent of its territory, or in the number of its population, but in the wisdom of its administration, in the activity of its inhabitants, in the full development of its resources. Against this development no balance of power can be of any avail. Most mischievous was, moreover, the principle of combining all the States of Europe on every isolated emergency; thus uselessly extending the ravages of war, and bringing nations into the fray which had no interest to defend or any wrong to avenge.

But we have not done with this principle. The present war between France and Prussia had its origin in the jealousy of France for Prussian aggrandisement in Europe. It is another war caused for or by the balance of power. Can it be considered a just cause of war? The authority of Grotius upon this point is of the greatest value. "We cannot admit," he said, "the validity of what some authors have taught that, according to the law of nations, it is lawful for us to take arms in order to enfeeble a State whose power is increasing, lest, if allowed to increase too much, it should be in a position, when occasion arises, to do us injury. We allow, that when deliberating whether we should make war or not, such considerations may have their weight, not as a justification, but as a motive of interest, so that if there be a just reason to take

arms, the fact of the aggrandisement of such State may render it prudent, as well as just, to declare war. But that we have any right to attack a State for the simple reason that she is in a condition to injure us, is contrary to all rules of equity. War is lawful only when necessary, and it cannot be necessary unless we have a moral certainty that the power we fear has not only the means but the intention of attacking us." Grotius, Book II., ch. i., s. 17, and Book II., ch. xxii., s. 5. It is clear, indeed, on every ground, that the war which now agitates and afflicts Europe is altogether a gratuitous breach of International Law.

But another principle is being evolved at this moment in Germany and Italy. It is the principle of Nationality. It is true that Prussia has stretched the bounds of her territory far and wide in Germany, that she has absorbed Hanover, destroyed the Republics of Frankfort, subjected the Hanse towns, and rendered Saxony and Baden subservient to her will. But she is only placing herself at the head of a German nationality. Equally true it is that Sardinia made war on the King of Naples, absorbed Tuscany, got hold of Lombardy and Venice, and now appropriates even Rome; but she has acted throughout on the principle, and asserted the right, of an Italian nationality. What constitutes true nationality, and whether it results from identity of language and literature, from unity of race and descent, from the possession of a national history, or from geographical position, it matters not. Suffice to say, that where the sentiment of nationality does exist in any force, there is a *prima facie* case for uniting all the members of the nation under the same government.

But admitting that a nation has the right to constitute itself into a people or separate State, has it a right to claim, even by force of arms, any portion of that people which hitherto may have formed part of another nationality, or have been subject to another State? Take the case of Rome at the present moment. Have the Italians any right to that province or State? The only answer is that the right of nationality must be held superior to any right arising from the present organisation of States. The spirit of nationality is strong and enduring, and it is because it is not sufficiently recognised in the constitution of States that we have to lament the frequent occurrence of revolution and war.

Interventions have also been frequent causes of war. On the principle that, whenever a sudden and great change takes place in the internal structure of a State, dangerous in a high degree to all neighbours, they have a right to attempt by hostile interference the restoration of an order of things safe to themselves, or at least to counterbalance, by active aggression, the new force suddenly acquired. Russia, Prussia, and Austria arrogated to themselves the right of interfering with any

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changes in the political system of the Italian States. France intervened in Spain to reverse the national party, and to re-establish absolute government; Russia, Prussia, and Austria tore to shreds, and divided among themselves poor distracted Poland. In most cases, let it be observed, it was the strong that interfered in the affairs of the weak, and it was rare indeed when such interventions were suggested from any regard to the interest of the weak. But even if it were, that would not justify the intervention. It might appear a chivalrous act on the part of a strong power to offer its aid to a weak State at a moment of danger, but universal experience proves that no State can long maintain its independence if it is to be beholden for it to the support of another power. It should be remembered, moreover, that an armed intervention is war, and that no duty of friendship or generosity can justify the unsheathing of the sword, and the perpetration of so much evil as war brings in its train.

But there is another kind of intervention of an amicable character in which we are at present deeply interested. In its primary sense the word "intervention" means to come in between things or persons, to interfere in the affairs of another. Has a nation any right to exercise such interference? Does the community of interest, which binds us altogether, give us a voice in the acts and conduct of other States? Can we force our offices or interpose our action on an unwilling nation? To do so would be to infringe the sovereign rights of other States—would be to incur the certain danger of war. And it is the same thing whether we interfere *officially* by verbal notes through our ambassadors, or *officially* by formal notes or letters, or by the proposal of a congress, or in an armed manner preceded by an ultimatum, and accompanied by a military demonstration. In either case the intervention would be the sole act of the intervening party, which might be resented or opposed by the parties affected by it. Mediation, on the other hand, is quite another thing. A State may most appropriately at any time offer its good offices for the amicable settlement of a dispute. It may be asked by the contending parties themselves to make proposals for such settlements without binding themselves to accept such proposals; or may be constituted arbitrator to decide the question. There is no interference in mediation. It is not a forcing of one's own will or action upon others, but it is only the manifestation of willingness and readiness to perform a friendly act. What should be done in the present difficult position of France and Prussia? Should England intervene? Notes verbal or official would be of little purpose. For a congress they are not ready. An armed intervention would be war to either State or to both. Surely, then, no intervention is possible. But it is otherwise with mediation. This may be offered at any time without any danger of wounding the susceptibilities of either power.

The only justifiable cause of war, if we once admit its lawfulness, is self-defence. England, for instance, has mighty interests to defend at home and abroad. She has an enormous trade; she has unbounded wealth; she has colonies and dependencies widely scattered and isolated; she has an extensive number of subjects planted in every part of the habitable globe. Nothing could be more natural than that she should be jealous of her rights, and that she should be prepared to defend them at all hazards. But a limit must be put even to this right of self-defence. Many of the wars for the balance of power were waged on the plea of self-defence, and the enlargement of a State, though more than thousands of miles distant, has been held sufficiently dangerous to justify a war. But surely nothing short of actual invasion of territory, nothing less than an act of aggression on the sovereign rights of a State, should justify a war of self-defence. International Law has given even to this principle too great a latitude, and the European nations have been too prone to use it as a convenient justification for acts of unhallowed aggression.

When war has once been declared it seems almost puerile to spend much time in settling the exact bounds to which the belligerents may lawfully proceed, for bitter experience proves that when the passions are unfurled, the reign of law is at an end. We may wish, however, that even as respects the conduct of nations in time of war, International Law should be more definite and consistent. It is a sound principle that, whilst whatever is likely to be conducive to the accomplishment of the enterprise is allowable, whatever has not that object directly in view is not to be held lawful. But the principle is neither properly carried out nor universally applied. It may be right, because necessary, in a belligerent to capture soldiers, military officers, and arms, but no such justification exists for the capture of goods and property of private individuals. Nevertheless, whilst International Law seems to disallow the capture of private property by land, except, indeed, in case of fortified towns, in the form of booty, it permits it by sea. The United States of America proposed in 1856 to accept the regulation relating to the abolition of privateering, on condition that private property on the high sea should be exempted from seizure. But England did not accept the proposal. Now Prussia has taken the initiative in this important reform. Let us hope that at a future congress the principle may be established by the consent of all nations. Upon the principle that war should be waged against the armed forces of the belligerent, and not against inoffensive subjects or places, no private individuals should be captured or shot, and nothing should be destroyed but what may be used as means of offence and defence in actual warfare. Yet we still hear, though International Law does certainly not justify it, of wanton practices

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against whole populations, of the destruction of ports of trade, and of the bombardment of places not fortified. The right of search also as practised in former wars is vexatious and needless. Since it is the destination that determines whether an article is contraband or not, it should rest with the belligerent cruiser to bar, if he can, the entrance of such into the enemy's country, without disturbing for that purpose the entire trade of the world. The case of the *Trent*, during the American War, showed the necessity of having it declared, that packets engaged in the postal service, and keeping up the regular and periodical communication between the different countries in Europe, America, and other parts of the world, should be exempt from visit and search. The list of contraband articles would need to be reduced and rendered more certain. The blockade of commercial towns also can scarcely be defended as useful or necessary, since, by the improvement of internal communication, the enemy is, in most cases, able to provide himself with necessaries from other means. Many, indeed, are the improvements needed in the principles of International Law relating to the rights and duties of belligerents.

But not less essential it is to define more correctly the rights and duties of neutrals. It is all important to realise the fact that a state of war between any two States is highly detrimental to the interests of every other nation, who suffer from the destruction of their trade and the diminution of their resources. It is not as a concession, but as a right, that neutrals claim to continue their trade and navigation undisturbed; and it was not more than they were entitled to, when they wrested from the belligerents the principle that the neutral flag shall cover enemy's goods, and that neutral goods shall not be liable to capture under the enemy's flag. But the great question of the duties of neutrals respecting the sale and transport of contraband of war remains to be settled.

What is most important of all, however, in International Law, is to put an end to the obscurity and uncertainty which now exists on many subjects; and I conceive that we could not pursue a better course to that end than by following up the useful precedent set by the Conference of Paris of 1856, in reducing as many of the points as are recognised and acted upon by the civilised States, into so many distinct propositions to be recognised and expressly assented to by all civilised States. If we could bring nations to understand that International Law is really binding upon us, and if we could clothe its precepts with the authority of an express agreement, we should do much to secure a fuller compliance with its requirements. A congress is likely to take place at the conclusion of the present war to restore order in the political system of Europe. Let us hope that an effort may then be made to put the law of nations

on a firmer and more satisfactory footing than it has ever yet been placed.

And since, with the multifarious and complicated relations between States, disputes will ever arise, let us provide some means for their peaceful arrangement without resorting to the fearful alternative of war. The Treaty of Paris of 1856, concluded between Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, has a provision "that if there should arise between the Sublime Porte and one or more of the signing Powers any misunderstanding which might endanger the maintenance of their relations, the Sublime Porte and each of such powers, before having recourse to the use of force, shall afford to the other contracting parties the opportunity of preventing such an extremity by means of their mediation." And, further, in the Protocol of the Congress the same powers, on the proposition of the late Earl Clarendon, agreed as follows:—"The plenipotentiaries do not hesitate to express in the name of their governments the wish that States between which any serious misunderstanding may arise, should, before appealing to arms, have recourse, as far as circumstances might allow, to the good offices of a friendly power." It is true that Count Walewski, as representing France, in approving, added—"That the wish expressed by the Congress cannot in any case oppose limits to the liberty of judgment of which no power can divest itself in questions affecting its dignity." Yet it might have been expected that when England appealed to the protocol, and offered mediation, both powers, and France especially, by whom the offensive was taken, should have consented to submit her grievance, in the first instance at least, to the arbitration of two friendly powers. This important concession to public opinion, however, cannot be allowed to be thus foiled, and it is well to consider by what means the agreement may be rendered more operative.

What is wanted is the formation of an International Council composed of the foreign ministers and ambassadors, for the time being, of all the civilized powers, for the determination of any disputes and difficulties which may arise between such States, to be summoned only when such differences arise. We should guard against the admission of any provision, such as that which was taken advantage of to justify France in withdrawing from the agreement on this last and most fatal war to herself. And it ought to be part of the arrangement, on the example of our municipal jurisprudence in matters of arbitration, that should, notwithstanding such formal agreement, any one power refuse to abide by its engagement, the other power or powers should still appeal to the International Council for the determination of the dispute, and the pronouncement of an award, and that the Council should proceed with the consideration of the question without regard to that refusal. Two important advantages would result from such an arrangement.

We should obtain from an impartial tribunal a deliberate opinion on any question which might disturb the peace of the world. And we should have the moral weight of the civilized world brought to bear against the nation which, whether as the aggressor or the aggrieved, refuses to abide by its formal agreement, or to comply with the deliberate award of the International Council. I am not proposing, that in case of such refusal all the States should join with the other powers in enforcing the award. We must not fall into the blunders of another Holy Alliance. We must not, with a view, or in the hope of promoting peace, extend the range of quarrels and wars. Moral reforms can only be achieved by moral means. But I do attach the greatest possible weight to an arrangement which might relieve many States from pursuing a course of hostility to a point where it becomes almost impossible to retract. We must count on the moral feeling, on the honour, on the good sense of nations, and we must strive to put some barrier to the first outburst of passions, by retarding the steps which might otherwise inevitably end in open war.

Too long have we seen, with seeming indifference, this grossest outrage against all that is sacred and humane. Too long have we sat with folded arms, witnessing the fatal course which brought one power after another towards a certain ruin. The suggestion I have the honour of making has already received a certain amount of diplomatic sanction. Let it be matured, developed, and strengthened. But, whether by this or by any other means, let us devote our highest effort to remove for ever from the bounds of the civilized world the demon of war. By all that is sacred in the human breast, by all that is noble, enlightening, and elevating in our advancing civilization, by all that animates us to sentiments of affection and amity towards our brother man, all the world over, let us put an end to this grossest and blackest of all crimes, the crime of war. The natural state of man in society is peace, and not war. Let us ask this noblest of all services from International Law, that it may provide means by which nations may live in peace and concord among themselves.—*Law Magazine.*

It is the business of a lawyer to be ready-witted; and it may be that he whose wit is sharpened in daily encounters deserves little credit for readiness. This does not detract, however, from the merit of such as this passage of Jekyll. Lord Ellenborough, who was a severe judge, was one day at an assize dinner, when some one offered to "help him to some fowl." "No; I thank you," said his lordship, "I mean to try that beef."

"If you do, my lord," said Jekyll instantly, "it will be *hung* beef."

CANADA REPORTS.

PROVINCE OF ONTARIO

GENERAL SESSIONS OF THE PEACE, COUNTY OF SIMCOE.

Before J. A. ARDAUGH, Esq., Deputy Judge, Chairman.

IN RE CHARLES C. WEBSTER AND OTHERS.

31 Vic. cap. 68—Affidavit of residence—Certificate of Justice—Oath of allegiance.

[Barrie, Dec. 19, 1870.]

This was an application to prevent certificates of naturalization being issued by the Court of General Sessions of the Peace for the County of Simcoe, to Charles C. Webster, John W. Fisher and B. F. Kendall, under the provisions of the Dominion Act 31 Vic. cap. 66.

The grounds of opposition were—

1. That the time of residence is not stated in the affidavit of residence.
2. That the certificates of the justices of the peace, read on the first day of the Court, do not show that the requisite oaths of allegiance have been taken by the applicants.
3. That initial letters only are used in the headings of the affidavits, and not the full names of the applicants.

ARDAUGH, D. J.—As to the first ground, the contestant insists that affidavits of residence having been filed with the Clerk of the Peace, they must be considered as open to objection by any person contesting the granting of the certificates.

The act requires (by section 3) that every alien now residing in any part of this Dominion, and who, after a continued residence therein for a period of three years or upwards, has taken the oaths of residence and allegiance, and procured the same to be filed of record as thereafter prescribed, so as to entitle him to a certificate of naturalization as thereafter provided, shall thenceforth enjoy the rights of a natural-born subject.

Now, it will be noticed that no provision is made for filing of record the affidavits of residence and allegiance; the only thing required to be filed of record is the certificate of residence. Section 5 provides that this certificate shall be presented to the court on the first day of some general sittings thereof, and shall be read in open court; and that if the facts mentioned therein are not controverted, nor any other valid objection made to the naturalization, such certificate shall be filed of record on the last day of such general sittings. Here it will be seen that the mere lodging of the certificate is not to be considered as a filing thereof, such filing taking place only upon the order of the court on the last day of its sitting.

Again, the only certificate spoken of is one of residence alone (except, indeed, that mentioned in section 6, to which allusion will be made presently); and this appears from section 4, subsection 3, which provides that a justice of the peace, on being satisfied by evidence produced that the alien has been a resident of Canada for a continuous period of three years or upwards, and is a person of good character, shall grant to

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him a certificate setting forth that such alien has taken and subscribed the said oath, &c.

Section 5 of the act prescribes the mode of procedure, and enacts that such certificate (that is, in our opinion, the certificate of residence only) shall be presented to the court in open court on the first day of some general sitting thereof, and thereupon such court shall cause the same to be openly read in court.

From this we take it that the only thing before the court, and the only thing they are bound to take notice of, is this certificate of residence. Behind this we cannot go, nor have we authority to enquire whether the evidence upon which it was granted was sufficient. We must presume that the justice who granted it saw that the act was complied with. The mere production of an affidavit, appearing to have been made by the applicant, is not necessarily conclusive that no proper affidavit was made before the justice granting the certificate; and further, the court is not called upon to listen to or take notice of any affidavit, not being authorized thereto by the act.

Section 5 then goes on to say, "And if, during such general sitting, the facts mentioned in such certificate are not controverted, or any other valid objection made to the naturalization of such alien, such court, on the last day of such general sitting, shall direct that such certificate shall be filed of record in such court."

Here, then, we must enquire if the facts mentioned in such certificate (read on the first day of the court) are controverted or not. It is not attempted to be shown by the contestant that the alien has not taken and subscribed the oath of residence, but merely that he has made an affidavit which does not conform to the act. This, we think, is not such a controverting of the fact of residence as to form a bar to the granting the certificate mentioned in section 6, in the face too of the certificate of the justice saying the oath of residence has been made, and further, that a residence of seven years has actually been proved before him.

2. As to the second objection. In no place do we find that the justice is to state that the applicant has taken the oath of allegiance. Subsection 3 of section 4 prescribes what sort of certificate is to be given, and only alludes to one of residence; and section 9 again speaks of a certificate of residence only as the one to be read by the Clerk of the Peace.

3. As to the third objection. We know of no law requiring the exclusion of initial letters in the heading of affidavits. The courts of law and equity, we believe, have made such a rule, but it refers only to matters and suits in these courts.

Therefore the court determines, that as none of the facts mentioned in the three above certificates are contravened, nor any valid objection made to the naturalization of the above named Charles C. Webster, John W. Fisher and B. F. Kendall, and as it is against public policy that such certificates should be refused, except upon good and sufficient grounds, that such certificates should be filed of record under the provisions of said act.

We have alluded above to the certificate to be granted by the court under section 6. A difficulty here presents itself. The form given

recites the reading of a certificate that the alien has complied with the requirements of the act, that is, amongst other things, that he has taken the oaths of residence and allegiance. In no place, however, do we see any provision for such a certificate. As stated above, the only certificate to be read is that mentioned in section 5, and that says nothing whatever about the oath of allegiance. In consequence of this, and inasmuch as the third section enacts that the oaths of residence and allegiance required by section 4 shall be filed of record before the alien shall be entitled to a certificate of naturalization (but without saying when the same are to be made, or when or where they are to be filed), the Clerk of the Peace is hereby directed not to file the certificate read before the Court, nor to issue the certificates mentioned in section 6 until the said oaths are duly filed of record with him.

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CHANCERY.

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Arbitrator — Award — Clerical error — Power to rectify — Power of arbitrator as to costs.

Where an arbitrator has once signed a document purporting to be his award he has no power to rectify even a clerical error, but an application for that purpose ought to be made to the Court under the Common Law Procedure Act, 1854.

Where an arbitrator appointed by a Court of equity is, by the terms of the reference, empowered to deal with the costs of the suit, he has jurisdiction to give costs as between solicitor and client.

[L. J., 19 W. R. 86.]

This was an appeal from a decision of Vice-Chancellor Bacon, which is reported 18 W. R. 1068, where the facts are very fully stated.

On the 17th January, 1868, an order was made in this suit by consent, referring all the matters in difference between the parties in the cause to the determination of Mr. Henry Udall, who was to make his award on or before the 17th of April, 1868. The order provided that the costs of the cause, and of the application for the order, and of the reference, should be in the discretion of the arbitrator; that the arbitrator should have power from time to time to enlarge the time for making his award; and that either party should be at liberty to apply without notice to the other that the award might be made an order of the court. The arbitrator afterwards enlarged the time for making the award till the 17th of April, 1869. On the 12th of November, 1868, Mr. Udall signed a paper, purporting to be his award, by which he declared that the defendant was liable to pay to the plaintiff £400, and he ordered that the defendant should pay to the plaintiff his costs of the suit and of the application for the order of reference and the charges of the award. He ordered also that the costs should be taxed as between solicitor and client, and he declared that there were no other matters in difference in the suit brought before him than such as he had thereby determined upon.

A copy of this award was delivered to the plaintiff's solicitors, but no copy was served on the defendant or on his solicitors. Mr. Udall

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afterwards discovered that the document which he had signed as his award differed from the original draft which he had written, by the omission of a direction that the defendant should pay the costs of the reference. On the 2nd of Dec., 1868, Mr. Udall sent to the plaintiff's solicitors a corrected copy of his award, with a letter explaining the omission, and stating his opinion that the former document under the circumstances was not his award. On the 3rd of December, 1868, the plaintiff's solicitors served a copy of the award of December 2nd, with a copy of Mr. Udall's letter, on the defendant's solicitors. On the 18th of March, 1869, an order was made by Vice-Chancellor James, *ex parte*, on the application of the plaintiff, that the award of December 2nd should be made an order of the Court. On the 16th of July, 1870, the plaintiff gave notice of motion to the defendant to enforce the performance of the award of December 2nd. The defendant then gave to the plaintiff a cross-notice of motion to discharge the order of the 18th of March, 1869, on the ground that the document of the 2nd of December, 1868, was not the true award of Mr. Udall, it having been made after he had made a previous award, and after communications between him and the plaintiff's solicitors, in the absence of the defendant and his solicitors.

These two motions were heard together by the Vice-Chancellor, and he made an order in the terms of the plaintiff's notice of motion, but refused the defendant's motion, giving no costs on either side.

The defendant appealed.

Fry, Q.C., and J. W. Chitty, for the appellant.—The first award was complete and intelligible, and the arbitrator had no power to alter it after he had signed it: *Henfrees v. Bromley*, 6 East, 309; *Irvine v. Elnon*, 8 East, 54; *Ward v. Dean*, 3 B. & Ad. 284. The second award being a nullity there can be estoppel against the appellant because he did nothing to set it aside before the plaintiff attempted to enforce it. Another objection to the second award is, that communications took place between the arbitrator and the plaintiff's solicitor behind the back of the defendant: *Harvey v. Shelton*, 7 Beav. 455; *Mills v. The Bowyers' Company*, 8 K. & J. 67. Moreover, the arbitrator had no power to give costs as between solicitor and client: *Whitehead v. Firth*, 12 East, 165. They referred also to *Auriol v. Smith*, T. & R. 121, and the Common Law Procedure Act, 1854, s. 8.

Kay, Q.C., and G. Williamson, for the plaintiff, were called on only with regard to the power of an arbitrator to correct a mistake in his award when once made. They contended that *Henfrees v. Bromley* was really in favour of the plaintiff, and that it was not qualified at all by *Irvine v. Elnon*. As to *Ward v. Dean*, it was quite a different case from the present. The arbitrator had set his hand to a document, and there was no other document to show that he had made a mistake; it was nothing but a question of his recollection. They also referred to *Vorley v. Cook*, 1 Giff. 280.

No reply was called for.

JAMES, L. J., said that the Vice-Chancellor made an order in substance enforcing the second

award, or the document so called, and refused an application by the defendant to have an order making the second award an order of court discharged, and he gave no costs on either side. There was no intention now of interfering with the order as to costs. His Lordship thought the contention of the defendant was a very idle and technical one, and he must have known from the very first, that if he insisted upon it, the error would be at once set right upon an application to the court. But, at the same time, it was very important to adhere to previous decisions, and his Lordship thought that the present case could not be distinguished from *Ward v. Dean* (*ubi sup.*), which was as clear a case as possible of a merely clerical error. But even at that time, when the court had no power to remedy a mistake, however trivial, in an award, they thought that it would not be safe to open the door to anything outside the written document, which, when once it had been signed ought to stand. This decision and others of the same kind must have been in the contemplation of the Legislature when it passed the Common Law Procedure Act. That statute provided the most ample means of setting right any mistake which might have been made by an arbitrator, and it was certainly better that any step taken to correct an accidental error in an award should be taken in the manner provided by the Act. The mistake which had been made in the present case was of the most palpable nature, and the matter must be referred back to Mr. Udall to reconsider and redetermine it in respect of the mistake which was certified by him to have been made in his original award of November 12th. Two other points were taken in the argument. One was that Mr. Udall had been improperly having interviews with one of the parties behind the back of the other. His Lordship quite agreed that it was very important to prevent an arbitrator from receiving evidence or hearing arguments in the absence of one of the parties. But the only communication which in the present case was made by the plaintiff to the arbitrator in the absence of the defendant, was the putting the question to him, "Did you not make a mistake in copying your award?" He admitted that he had done so, and his answer was at once communicated by letter to the defendant's solicitors. There was no pretence for saying that he had been induced by any such communication to alter his award, or that there had been any misconduct on his part. If the court thought that there had, of course they would not refer the matter back to him, but would refer it to some one else. The other argument was that the arbitrator had no power to give costs as between solicitor and client. But at any rate that would not make the award bad in form. All the costs of the suit, as well as the costs of the reference and the award, were referred to the decision of the arbitrator, and he thought it right, having regard to the fiduciary relation existing between the parties, to give the costs as between solicitor and client. It was enough to say that he had jurisdiction to do it, he being the person appointed to decide who should pay the costs of the suit. The order appealed from must be discharged, but with costs, and the matter must be referred back to the arbitrator as already mentioned.

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MELLISH, L.J., was of the same opinion. The result of the cases at law was that when an arbitrator had once signed a paper which, on the face of it, purported to be his award, he was *functus officio*, and could not make any alteration in the award. And, though his Lordship regretted that costs to such an extent should be incurred, he was not certain whether it was not, on the whole, better in all such cases that the parties should come back to the court to set an error of this description right. His Lordship thought that there had been nothing on the part of the defendant which amounted to acquiescence in the second award, for he had not been party to anything in the nature of an agreement to do so. He had done nothing beyond remaining passive. His Lordship also agreed with his learned brother as to the power of the arbitrator to give costs as between solicitor and client. Common law courts had no power to give costs in that way, and therefore, in the case of a reference by one of these courts, an arbitrator could only give party and party costs. But a court of equity had jurisdiction to give costs as between solicitor and client whenever it thought fit to do so, and consequently, when the costs of the suit were left in the discretion of the arbitrator, he had jurisdiction to give costs as between solicitor and client.

DICKINSON V. TALBOT.

Power of sale and exchange—Consent of tenant for life—Sale to tenant for life.

It is a well settled rule, that where trustees of a settlement have a power of sale and exchange over the settled estates, to be exercised at the request or with the consent of the tenant for life, they may sell to the tenant for life just as they may to any other person.

The reason for that rule is, that the consent of the tenant for life to the exercise of the power is required for his own benefit, and does not place him in any fiduciary relation to the persons entitled in remainder.

Provided a sale by trustees to a tenant for life is *bona fide* and at a fair value, it is immaterial what was the object for which he made the purchase.

[L. J., 19 W. R. 136.]

This was an appeal from a decision of Vice-Chancellor Stuart.

By an indenture dated the 2nd January, 1849, and made between Lord Skelmersdale and the Rev. S. Master of the first part, Charles Scarisbrick of the second part, and Ralph Anthony Thicknesse and John Woodcock of the third part, certain manors, lands and hereditaments, known as the Wrightington Estate, were conveyed to R. A. Thicknesse and John Woodcock and their heirs, to hold the same unto R. A. Thicknesse and John Woodcock and their heirs, to the use of Charles Scarisbrick and his assigns during his life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainders to the issue of Charles Scarisbrick as therein mentioned, with an ultimate remainder, in the events which happened, to the use of the plaintiff's mother for life, with remainder to her first and other sons successively in tail male. The settlement contained a power for the trustees at any time or times, at the request in writing of any person who should for the time being, by virtue of the limitations thereinbefore contained, be either the actual possessor of or entitled to the receipt of the rents of the settled

property so as to be tenant for life or tenant in tail of the age of twenty-one years, to dispose of and convey, either by way of absolute sale or in exchange for or in lieu of other lands situate in England or Wales, all or any part of the settled property and the inheritance thereof in fee to any person or persons whomsoever, for such price or prices, or for such an equivalent in lands, as to the trustees should seem reasonable.

By another indenture of the same date, and made between the same parties, another estate, called the Eccleston Estate, was conveyed to the same trustees, upon (in the events which happened) the same uses, and the like powers of sale and exchange were given.

Charles Scarisbrick remained in possession of both estates until his death, which happened on the 6th of May, 1860. He was never married. By the death of the other intervening tenants for life, the plaintiff, in 1868, became tenant in tail in possession of both estates. He, in 1884, filed the bill in this suit against the representatives of the trustees of the two settlements, and the executors and trustees of Charles Scarisbrick, for the purpose of impeaching certain dealings with some portions of the estates, called respectively Bottlingwood and Hurst House, which had taken place between Charles Scarisbrick and the trustees. Both those properties had been sold and conveyed by the trustees to Charles Scarisbrick; and the plaintiff sought to have these transactions set aside on the ground that the sales had been made at an undervalue, and also that as to Bottlingwood there had been a collusion between the trustees and the tenant for life, inasmuch as Mr. Scarisbrick desired to exchange Bottlingwood with Lord Balcarras, a neighbouring landowner, for other property, and, finding that there were some conveyancing difficulties as to the exercise of the power of exchange, because it was proposed to exchange only the surface, agreed with the trustees that they should sell Bottlingwood to him under the power of sale, in order that he might afterwards, as he in fact did, exchange it with Lord Balcarras. It was alleged that the Hurst House estate too was bought in order that Mr. Scarisbrick might exchange it with another person.

The Vice-Chancellor dismissed the bill, except so far as it sought an account and the delivery up of title deeds to the plaintiff. The plaintiff appealed.

Greene, Q. C., Dickinson, Q. C., and F. Riddell, for the plaintiff, contended that there was a fraud upon the power. They referred to *Howard v. Duane*, T. & R. 81; *Grover v. Hugell*, 8 Russ. 428.

Sir R. Palmer, Q. C., O. Morgan, Q. C., and C. Hall, for the executors and trustees of Charles Scarisbrick, and

Kinslake, Q. C., and Rasch, for the representatives of the trustees, were not called upon.

JAMES, L. J.—The Vice-Chancellor was of opinion that the plaintiff's case, in respect of the two properties in question, which has been argued before us on the appeal, had failed, and dismissed that part of the bill with costs. I am entirely of the same opinion. In my judgment, a case with less foundation, more idle and vexatious, to be brought by a *cestui que trust* against the repre-

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representatives of deceased trustees, was never presented to the court. The law of this court is, and is well established and known, that where there is a power of sale and exchange given to trustees, to be exercised at the request or with the consent of the tenant for life, they may sell to the tenant for life just as they may sell to any other person. No doubt Lord St. Leonards, in his book on Powers, says that it was formerly a considerable question whether a tenant for life, whose consent was required for the exercise of a power of sale and exchange, could buy the estate himself, or take it in exchange for an estate of his own. He is referring there to something which had occurred before the case of *Howard v. Ducane*, and he says, "Lord Eldon, though fully aware of the danger attending a purchase of the inheritance by a tenant for life, seems to think it cannot be impeached upon general principles." Then he refers to the case, which appears to me very important indeed, where the House of Lords actually refused to pass a bill sanctioning a sale, for fear of throwing a doubt upon the established practice of conveyancers respecting the right of sale to a tenant for life. Then Lord St. Leonards says, "The point has at last been set at rest (that is in 1826) by the decision of the Lord Chancellor in favour of the validity of the execution of the power in the late case of *Howard v. Ducane*." From 1826 to the present time, I am not aware that there has ever been the slightest attempt to unsettle that which was so considered settled. I take it that the meaning of the rule, and the only ground upon which that rule can be sustained, is that the tenant for life has given to him the power of consent, or the power to request, for his own benefit, and he has not in any way whatever a fiduciary character as between him and the tenants in remainder in respect of his consent or request. That being so, the tenant for life has the same right to buy from the trustees as any other person. Then it is alleged that in this particular case the sale was improper, because it was preceded, to the knowledge of the trustees, by a negotiation for an exchange with Lord Balcarras. There were conveyancing difficulties—not suggested as such difficulties for the purpose of inducing them to sell to the tenant for life—but conveyancing difficulties of a *bona fide* character existing, which made the negotiation for an exchange incapable of being carried into effect. Upon that, of course, the negotiation failed, and the thing passed into history. It was a sort of thing from which the parties had a new starting-point, and thereupon this gentleman said to the trustees, As you cannot do that, I am very anxious to accommodate my friend, Lord Balcarras, and it would be a convenience to me, and therefore I propose to buy from you, and I tell you that my object in buying from you is to do a thing which will accommodate my neighbour and be a benefit to myself. I am not aware of any rule of law, or any Act of Parliament, or any decision of this court, which says that, if a man is otherwise entitled to buy an estate from the trustees, he is not entitled to buy it if his intention is to do an act of kindness to his neighbour, or to obtain some benefit for himself, provided he gives the full value for the estate. This gentleman might have said, "I want to buy the estate

because I wish to make a speculation of it, which you, the trustees, cannot enter into;" or he might have said, "I want to give it for a church or school-house," or "I want to save my neighbour from an annoyance which he may otherwise be subjected to." It appears to me, as I said before, that there is no Act of Parliament or rule of this court which says that that is wrong or improper. That seems to me to be the whole case as to the Bottlingwood property, except that it is said that there was something which the tenant for life was aware of which he ought to have communicated to the trustees; and possibly—I will say more than possibly—probably the tenant for life may not be exactly in the same position of a stranger with respect to non-communication of facts. It may be supposed that he has a knowledge which may to a certain extent enlarge the obligation which may be imposed on every man not to conceal something which he knows and which ought to be known to the other side, that is, the vendor.

[His Lordship then reviewed the evidence of the alleged concealment of the value of the Bottlingwood property by the tenant for life, and of his having bought it at an undervalue, which evidence he considered entirely failed to prove the plaintiff's allegations. He also expressed his opinion that the evidence as to the Hurst House Estate equally failed, and added—] I am of opinion, therefore, that the case has wholly failed as to both points, and that the Vice-Chancellor's decree was perfectly right.

MELLISH, L. J.—I am of the same opinion. Since the case of *Howard v. Ducane*, at any rate, it appears to have been the settled rule of this court that there is no objection in itself to a sale from trustees to a tenant for life, although the consent of the tenant for life is necessary for such a sale. This rule was acted upon apparently in the practice of conveyancers for many years before *Howard v. Ducane* was decided, and has been acted upon ever since, and certainly we should do very wrong if we allowed any doubt to be cast upon that. The sale being in itself perfectly good, the tenant for life not being in any respect a trustee for the persons in remainder, what ground is there for setting aside either of these sales? As I understand it, the argument insisted upon is this—that because it was originally contemplated in both cases that there should be an exchange, and that these sales were effected as it were for the purpose of effecting the exchange, therefore the exchange ought to be carried out by this court for the benefit of the persons entitled in remainder. I cannot see what ground there is for that. In both cases there seems no doubt that Mr. Scarisbrick did in the first instance intend to effect an exchange *bona fide*, if the exchange could properly be effected under the power; but in both cases the lawyers raised difficulties, and said there were doubts whether the exchange could take place under the power, and those difficulties seem to have been, as far as appears, perfectly *bona fide*. The matter was therefore given up, and certainly it would be a very extraordinary thing if, it having been given up because there was no power to effect it, and not having been carried out, we should now, because it would happen to be for the advantage

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of the tenants in remainder, treat it as if the exchange had really taken place.

There is nothing to show that the parties really intended to effect an exchange. They were told they could not effect an exchange, and therefore they gave it up. That being so, unless it is made out that the properties, or one of them, were improperly sold at an undervalue, I cannot see what case there is for the plaintiff.

[His Lordship then discussed the evidence, which he considered failed entirely to establish that the sales were at an undervalue, and added] On these grounds I think the decision of the Vice-Chancellor was perfectly right, and the appeal must be dismissed with costs.

UNITED STATES REPORTS.

SUPREME COURT OF UNITED STATES.

THE NATIONAL BANK OF THE REPUBLIC, PLAINTIFF
IN ERROR V. REES J. MILLARD.

Bank cheques.

Held, that the holder of a bank check cannot sue the bank for refusing payment, in the absence of proof that it was accepted by the bank, or charged against the drawer.

Mr. Justice DAVIS delivered the opinion of the Court.

This is an action of assumpsit brought by the defendant in error, against the National Bank of the Republic, for failing to pay a check drawn on it, in his favor, by one Lawler, a paymaster in the United States army. The declaration, in addition to the special count on the transaction, contained a general count for money had and received by the defendant to the use of the plaintiff. The only question presented by the record which it is material to notice is this: Can the holder of a bank check sue the bank for refusing payment, in the absence of proof that it was accepted by the bank, or charged against the drawer?

It is no longer an open question in this court, since the decision in the cases of *The Marine Bank The Fulton Bank*, (2 Wallace,) and of *Thompson v. Riggs*, (5 Wallace,) that the relation of banker and customer, in their pecuniary dealings is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositor shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Broughman, Lyndhurst and Campbell, in the case of *Foley v. Hill*, (2 Clark and Fennelly Reports of cases in House of Lords 1848-50, p. 28,) and they all concurred in the opinion that the relation between a banker and customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of

a fiduciary character, and the great weight of American authority is to the same effect.

As checks on bankers are in constant use, and have been adopted by the commercial world generally as a substitute for other modes of payment, it is important, for the security of all parties concerned, that there should be no mistake about the status which the holder of a check sustains towards the bank on which it is drawn. It is very clear that he can sue the drawer if payment is refused, but can he also, in such a state of case, sue the bank? It is conceded, that the depositor can bring assumpsit for the breach of the contract to honor his checks, and if the holder has a similar right, then the anomaly is presented of a right of action upon one promise, for the same thing, existing in two distinct persons, at the same time. On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If, then, the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it owes any duty to the holder until the check is presented and accepted? The right of the depositor as was said by an eminent judge, (2 Selden, 417) is a case in action, and his check does not transfer the debt, or give a lien upon it to a third person without the assent of the depository. This is a well established principle of law, and is sustained by the English and American decisions.—(*Chapman v. White*, 2 Selden, 412; *Butterworth v. Peck*, 5 Bosworth, 341; *Ballard v. Randall*, 1 Gray, 605; *Harker v. Anderson*, 21 Wendell, 373; *Dykens v. Leathe, Manufacturing Co.*, 11 Paige 616; *National Bank v. Eliot Bank*, 5 Am. Law Reg. 711; *Parsons on Bills and Notes*, edition 1863, pages 59, 60, 61, and notes; *Parke, Baron*, in argument in *Bellamy v. Majoribanks*, 8 Eng. L. & E. p. 522-3; 4 Barnwell and Creswell, *Wharton v. Walker*, p. 163; *Warwick v. Rogers*, 5 Maunings and Granger, p. 374; *Byles on Bills*, chapter, Check on a Banker; *Grant on Banking*, London edition, 1856, p. 96.)

The few cases which assert a contrary doctrine, it would serve no useful purpose to review.

Testing the case at bar by these legal rules, it is apparent that the court below, after the plaintiff closed his case, should have instructed the jury, as requested by the defendant, that the plaintiff, on the evidence submitted by him, was not entitled to recover. The defendant did not accept the check for the plaintiff, nor promise him to pay it, but, on the contrary, refused to

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do so. If it were true, as the evidence tended to show, that the bank, before the check came to the plaintiff's hands, paid it on a forged indorsement of his signature, to a person not authorized to receive the money, it does not follow that the bank promised the plaintiff to pay the money again to him, on the presentation of the check by him for payment.

It may be, if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex equo et bono* would be applicable, as the bank, having assented to the order and communicated its assent to the paymaster, would be considered as holding the money thus appropriated for the plaintiff's use, and, therefore, under the implied promise to him to pay it on demand.

It is hardly necessary to say, that the check in question having been drawn on a public depository, by an officer of the government, in favor of a public creditor, cannot change the rights of the parties to this suit. The check was commercial paper, and subject to the laws which govern such paper, and it can make no difference whether the parties to it are private persons or public agents—(*The U. S. v. Bank of Metropolis*, 165 Peters, 377.)

As soon as the deposit was made to the credit of Lawler as paymaster, the bank was authorized to deal with it as its own, and became answerable to Lawler for the debt in the same manner that it would have been had the deposit been placed to his personal credit.

As this case will be remanded for a new trial, it is not necessary to notice the exceptions taken to the charge of the court on the evidence introduced by the defendant.

Judgment reversed and a venire de novo awarded.
—*Chicago Legal News*.

SUPREME COURT OF ILLINOIS.

MAYFIELD V. MOORE.

Intruding officer—Liability of, for fees of office.

Held, that the legal right to an office confers the right to receive and appropriate the fees and emoluments legally incident to the place.

That where a person has usurped a place belonging to another, and received the accustomed fees of the office, an action for money had and received will be sustained at the suit of the person entitled to the office against the intruder.

That an officer's commission is evidence of the title, but not the title; that the title is conferred by the people, but the evidence of the right by the law.

That the appellee having received his commission as sheriff without a resort to fraud, he should be required to account only for the fees and emoluments of the office received by him after deducting the reasonable expenses incurred therein, and that if he had intruded without pretence of legal right, then a different rule should be applied.

That he should be charged from the time of entering upon the duties of the office, and not from the time the justices of the circuit court found him not entitled to the office.

That this being an equitable action, it should be governed in this respect by the same rules that would have obtained had this been a bill for an account instead of an action for money had and received.

(Springfield, Sept., 1870.)

Opinion of the Court by Mr. Justice Walker:
This was an action of assumpsit, brought by

appellant in the Morgan Circuit Court against appellee, to recover fees received by the latter as sheriff and collector of the State, County, and other revenue. It appears that on the 6th of November, 1866, appellant and appellee were opposing candidates for the sheriff of Morgan county, in this State. On a canvass of the vote of the county, a certificate of election was given to appellee, who afterwards received a commission and entered upon and discharged the duties of the office, from the 17th day of November, 1866, till the 13th day of January, 1868. Soon after the canvass of the vote was had, appellant gave appellee notice that he should contest the election, upon the grounds that illegal votes were cast for appellee—more than sufficient to change the result and give appellant the office.

Justices of the peace were selected, in the mode pointed out by the statute, a trial was had, which resulted in favor of appellant, and finding him, on the evidence adduced, to be entitled to the office. From this decision appellee removed the case to the Circuit Court of Morgan County by appeal. A trial was there had, with a similar result. To reverse the judgment of the Circuit Court, appellee sued out a writ of error to the Supreme Court, which was subsequently dismissed by the Court, and appellant was duly commissioned, and entered upon the duties of the office. He then brought this suit to recover the fees and emoluments of the office received by appellee whilst acting as sheriff. A trial was had in the court below, where appellant recovered a judgment for \$34.55, the amount of fees received after the rendition of the judgment by the Circuit Court, and before the office was surrendered to appellant.

On the trial below, appellant offered to prove to the jury the sum of money received by appellee whilst he exercised the office, as fees, allowances and emoluments, but on the objection of the attorneys for appellee, the Court refused to permit the proof to be made, and confined him to the receipt of fees, commissions and profits, which were received after the decision of the case by the Circuit Court. This ruling of the Circuit Court is urged as ground of reversal, and is the point upon which the whole controversy turns.

It is urged by appellant that he being entitled in law to the office, the fees and emoluments incident to it followed the title and were vested in him. And on the familiar rule that where one person has received the money which in equity and good conscience belongs to another, he may sue for and recover the same, in an action for money had and received.

We presume that it will not be questioned that the legal right to an office confers the right to receive and appropriate the fees and emoluments legally incident to the place. That where such an officer performs the duties of the office, that he may demand and receive the compensation allowed by the law. It cannot be, that in such a case another person can legally claim such compensation. An officer, having rendered services, is as fully entitled to the compensation fixed by law, as is any other individual entitled to a reasonable compensation for labor and skill rendered for an individual. The fees and emoluments are legally his.

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We also find that the authorities have still gone farther, and held, that where a person has usurped an office belonging to another, and received the accustomed fees of the office, money had and received will be at the suit of the person entitled to the office against the intruder. *Avis v. Stutely*, 2 Mod., 360—1 Sel. Nisi Prius, 68. And the same rule was announced and enforced in the case of *Crosbie v. Hurley*, 1 Alcock and Napier 431. In this last case there was a contest as to the title to the office, and the person recovering the title to it, sued the other who had acted, and recovered the fees and emoluments received whilst in possession and exercising the duties of the place. The same rule has been adopted in this country, and seems to be based in common law rules.

It is said by Blackstone in his commentaries, vol. 2, p. 36, that "offices are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, and are also incorporeal hereditaments; whether public, as those of magistrates, or private, as bailiffs, receivers, or the like. For a man may have an estate in them, either to him and his heirs, or for a term of years, or during pleasure only; save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice; for then they perhaps might vest in executors or administrators." Thus it is seen that the right to the fees and emoluments are stated to be co-extensive with the office. And this is undoubtedly correct, as it is analogous to every other thing capable of ownership. No principle of law can be clearer than the owners of lands and chattels is entitled to the products, increase, or fruits flowing from them, and the fees of an office are incident to it as fully as are the rents and profits of lands, the increase of cattle, or the interest on bonds or other securities.

A person owning any of those things, is by virtue of such ownership equally entitled to the issues and profits thereof, as to the thing itself. If then appellant was the owner of and held the title to the office of sheriff, he was as clearly invested with the right to receive the fees and emoluments. They were incident to and as clearly connected with the office, as are rents and profits to real estate, or interest to bonds, and such like securities. See *Gluscock v. Lyons*, 20 Ind., 1; *Petit v. Rousseau*, 15 Louisiana, 289; *Dorsey v. Smith*, 28 Cal., 21, and *The People v. Tieman*, 30 Barb., 193. We think that on both reason and authority appellant is entitled to recover the fees and emoluments arising from the office, whilst it was held by appellee.

It is, however, urged that appellee surrendered the office as soon as it was finally judicially determined that appellant was entitled to it, and is therefore not liable to account for any fees but those received after the Circuit Court decided the case on appeal from the three Justices of the Peace. This is not a question of intention, but a question of legal title to the sum in dispute. Under the law, so soon as a majority of the votes were cast for appellant at the election held in pursuance to law, he became legally and fully entitled to the office. The title was as complete then as it ever was, and no subsequent act lent the least force to the place. The

commission was evidence of the title, but not the title. The title was conferred by the people, and the evidence of the right by the law.

Nor can it be successfully claimed that appellee was not in the wrong. He was bound before entering upon the discharge of the duties of the office and the receipt of the emoluments, to know whether he had title. His position was the same as a person who, having a defective title to a tract of land, and enters into possession and the receipts of rents and profits. He entered at his peril. Nor do we perceive any hardship. After the vote was canvassed by the clerk and a Justice of the Peace, appellant promptly gave appellee notice that he would contest the election, and specifically pointed out the grounds. Being thus apprised of the grounds upon which appellant based his claim, the sources of information were open to him to learn the facts, and to have acted upon them. Failing to learn them, or having done so, not heeding them, he has no reason to complain if he has to respond to the wrong perpetrated upon another. He has entered into appellant's office without right, and has received the profits of the office, and like the person entering into the land of another with a defective title, he must answer for the profits.

Inasmuch, however, as appellee obtained the certificate of election, and a commission was issued to him, he was acting in apparent right, and so far as this record discloses, he resorted to no fraudulent or improper means to produce that result, he does not occupy the position he would, had he resorted to such a course. He should only be required to account for the fees and emoluments of the office received by him, after deducting reasonable expenses incurring them. This being an equitable action, it should be governed in this respect by the same rules that obtain, had this bill for an account, instead of an action for money had and received. He should only have a reasonable allowance for the necessary expense in earning the fees and emoluments. Had he intruded without pretence of legal right, then a different rule would no doubt have been applied.

In adopting the time when the Circuit Court decided that appellant was entitled to the office, as the period from which he was entitled to have the fees and emoluments of the office, the Circuit Court erred. That decision was no more potent to confer the right to the office, than was the decision of the three Justices of the Peace. It, as we have seen, was not the decision, but the vote of the majority of the electors of the county that conferred the right. The Court on the evidence found and declared the title, but did not confer it. We have seen that appellant was entitled to the office and its emoluments, from the time appellee entered into it, and became liable to account for them from that date, until he ceased to act and receive the fees and perquisites of the office.

The judgment of the Court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

—Chicago Legal News.

DIGEST OF ENGLISH LAW REPORTS.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.
FOR AUGUST, SEPTEMBER AND OCTOBER, 1870.

(Continued from page 308.)

ACTION.—See ATTORNEY.

AGENT.—See PRINCIPAL AND AGENT.

AGREEMENT.—See CONTRACT; VENDOR AND PURCHASER, 8.

ANSUITY.—See SECURITY.

ANSWER.—See EQUITY PLEADING AND PRACTICE.

APPOINTMENT.

Personal property was settled, and a general power of appointment given to a *feme sole*, and in default of appointment upon trust for her use for life, and, after her decease without having exercised the power of appointment, in trust for any future husband surviving her for life, and after his decease in trust for her children at such ages, on such days, and in such shares, as she by deed or will should appoint, and in default of appointment upon other trusts; there was a provision that if she or any future husband should become possessed of any property, it should be settled on similar trusts. She was afterwards married, and by a deed-poll appointed the trust property to herself and her husband absolutely. *Held*, that the general power was not cut down by the limited power, and that it could be properly exercised during coverture.—*Wood v. Wood*, L. R. 10 Eq. 220.

ARBITRATION.—See PARTNERSHIP.

ASSIGNMENT.—See ATTORNEY.

ATTORNEY.

Four partners pledged goods to the defendant as security for an advance. P., one of the partners, gave N., another partner, a power of attorney "for the purposes of exercising, for me, all or any of the powers and privileges conferred by a certain indenture of partnership constituting the firm," and generally to do all other acts as fully as P. himself. A deed was made by the other partners and by N. as attorney for P., dissolving the partnership and transferring P.'s interest to the others, who on the next day assigned all their property to the plaintiff for the benefit of their creditors. The defendant refused to deliver the goods upon the tender of the amount due, but sold them; the plaintiff brought trover. *Held*, that the power of attorney did not authorise N. to dissolve the partnership and transfer P.'s interest, the general terms being restrained by the context;

also, that the plaintiff could not maintain trover for a part of the goods. *Harper v. Godsell*, L. R. 5 Q. B. 422.

BANKRUPTCY.

1. B. and S. were partners, and had certain bills of exchange; S., without the authority of B. and in fraud of the partnership, indorsed and delivered the bills to the defendant in satisfaction of a private debt of his own, the defendant being aware of the fraud. S. having become bankrupt, his assignees and B. brought this action for conversion and for money received to their use. Judgment having been given for the plaintiffs, it was *held*, that the action might be maintained upon the count for money received.—(Exch. Ch.) *Heibutt v. Nevill*, L. R. 5 C. P. 478; s. c. L. R. 4 C. P. 354; 4 Am. Law Rev. 93.

2. H. being about to enter the service of a gas company, G. agreed with him to indemnify the company, and H. agreed that, if G. should receive notice of any default under the guarantee, it should be lawful for G. to take possession of any goods, &c., of H.; and in case G. should be called upon to make any payment under the guarantee, it should be lawful for G. to sell the goods, &c., at discretion. The event provided for in the contract happened, and G. took possession of the goods of H., who had in the meanwhile committed an act of bankruptcy, of which G. had no notice. The 12 & 13 Vic. cap. 106, sec. 133, enacts that "all contracts, dealings and transactions" made with the bankrupt *bond fide* before the date of the *fiat* or filing of a petition for adjudication, shall be valid, notwithstanding any prior act of bankruptcy committed without notice to the person dealing with the bankrupt. *Held*, that what was done was a "transaction" protected by the statute.—*Krehl v. Great Central Gas Co.*, L. R. 5 Ex. 289.

See FRAUDULENT CONVEYANCE, 2.

BILL OF EXCHANGE.—See BANKRUPTCY, 1.

BILLS AND NOTES.

Action on a bill of exchange accepted by J. and indorsed by the defendant. Plea, that the defendant did not indorse. The plaintiff and defendant were partners in a speculation; the defendant sold goods to J., who gave him the bill in payment; he indorsed it, handed it to the plaintiff, and asked him to try to obtain payment from J. *Held*, that to charge the indorser there must be an intent to stand in that relation, and that the above facts supported the plea denying the indorsement.—*Denton v. Peters*, L. R. 5 Q. B. 475.

BOND.—See BOTTOMRY.

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BOTTOMRY.

The appellants chartered a vessel for a voyage from Liverpool to Cuba and back. In Cuba their agent advanced money to the master on a bottomry bond. No attempt to communicate with the owner was made before the bond was granted, although he was at Liverpool and could have been telegraphed to. *Held*, that it was necessary to give notice to the owner, which was not excused by his insolvency, and that the bond was invalid.—*The Panama*, L. R. 3 P. C. 199; s. c. L. R. 2 A. & E. 390; 4 Am. Law Rev. 463.

BROKER.—See CONTRACT, 1.

BURDEN OF PROOF.

C., a licensed victualler, was charged, under 11 & 12 Vic. cap. 49, sec. 1, with unlawfully opening his house for the sale of wine and beer, during prohibited hours on Sunday, otherwise than as refreshment for travellers. His hotel adjoined a railway station; eight men were seen there, six of them having a glass of beer each, and two a glass of sherry each; four of them were strangers, and four were residents of the town. A train stopped at the station in a few minutes and seven of the men went by it, and one returned to the town, having come to see a son off by the train. There was a notice in the room that refreshments were supplied, during prohibited hours, only to travellers, and C. had given directions to the waiter not to give out refreshments without first asking the parties whether they were going by the train; but the waiter had failed to ask two of the men the question. *Held*, that the burden of proof was upon the informer, and there was no evidence that C. knew that any of the men were not travellers, nor evidence of an intention to break the law.—*Copley v Burton*, L. R. 5 C. P. 489.

See COLLISION.

CARRIER.—See NEGLIGENCE, 2-6.

CHARITY.

1. Testator devised certain houses and tenements to a corporation, "for this intent and purpose, and upon this condition," that they should yearly distribute £8 in charity, and that the rest of the rents and profits should be bestowed in repairs; and in case the corporation should leave any of these things undone, he willed that his next of kin should enter and hold the tenements to him and his heirs upon the same condition. At the testator's death the annual value of the property was £9 4s., and its present value was £830. *Held*, that after satisfying the charge of £8 for charity and keeping the buildings in repair, the resi-

due went to the corporation for its own benefit. *Attorney-General v. Wax Chandlers' Company*, L. R. 5 Ch. 503; s. c. L. R. 8 Eq. 462; 4 Am. Law Rev. 463.

2. Testatrix gave legacies to several charitable institutions, and her residuary estate to trustees, "to pay and divide the same to and among the different institutions, or to any other religious institution or purposes as they the said F. and W. may think proper." *Held*, that "religious" applied to "purposes" as well as to "institution," and that the gift was a good charitable bequest.—*Wilkinson v. Lindgreen*, L. R. 5 Ch. 570.

CHARTER PARTY.—See SHIP.

CHEQUE.—See PRINCIPAL AND AGENT.

COLLISION.

A brig was run into by a steamship in the evening; the steamship had the lights required by the Admiralty Regulations, but the brig showed no lights at all. *Held*, that the burden was on the brig to show that the non-compliance with the Regulations was not the cause of the collision.—*The Fenham*, L. R. 3 P. C. 212.

COMPANY.

1. A company's prospectus stated its object, and that more than one-half of the capital had been subscribed for. The plaintiff subscribed and paid a deposit. When the prospectus was issued very few shares were subscribed for, but more than half had been taken when the plaintiff subscribed. The memorandum of association, afterwards registered, extended the objects of the company, and for the variance between the prospectus and memorandum the court ordered the plaintiff's name to be removed from the list of contributories. *Held*, that the plaintiff could not maintain a bill to make the directors personally liable for the deposit money, there being no fraud on their part.—*Ship v. Crosskill*, L. R. 10 Eq. 73.

2. A fund was constituted by officials in the service of the East India Company, to provide annuities of £1000 each for those who retired after twenty-five years' service; the fund was made up by an annual deduction of £4 per cent. from their salaries, and by an allowance by the Company of £6 per cent. on the amount so paid. The rules of the subscribers provided that the annuitant, on taking the annuity, should pay "the difference between one half of the actual value on his life, and the accumulated value of his previous contributions, . . . but should the contribution be in excess, such excess shall be refunded;" also that "all questions proposed at a general

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meeting shall be determined by three-fourths of the members present or voting by proxy; and upon all general questions involving . . . any essential addition or alteration in the original rules, . . . all subscribers in India not able to attend" shall be allowed to vote by a written communication. In 1852, the Directors of the Company ordered that no refund be allowed in future, and sent out a new set of rules to be submitted to the Service, omitting the rule as to refund. In 1853, the new rules were passed at a general meeting, by 108 to 2. *Held*, that the refund was abrogated by the subscribers, in 1853, and that payments in excess after that date were not recoverable. (Lord Hatherly, L. C. dissenting.) — *Secretary of State for India v. Underwood*, L. R. 4 H. L. 580.

CONDITION.—*See* CHARITY, 1; LANDLORD AND TENANT.

CONDITIONS OF SALE.—*See* VENDOR AND PURCHASER, 2.

CONFIDENTIAL RELATION.

A decree was made in a foreclosure suit directing a sale in case of non-payment; at the sale the property was purchased by W., who was solicitor of a creditor of the mortgagees in a suit for the administration of the mortgagee's estate. Two days before the sale, W. took out a summons for the creditor to have leave to attend the proceedings in the foreclosure suit, but no order was made until after the sale. W.'s name was on the printed particulars of sale as one of the solicitors of whom particulars and conditions of sale might be obtained. *Held*, that the creditors were not precluded from purchasing, and therefore W. was not precluded by being their solicitor. — *Guest v. Smythe*, L. R. 5 Ch. 551.

CONSIDERATION.

Declaration that the plaintiff had alleged that certain moneys were due to him from H., and was about to take legal proceedings against H. to enforce payment; and thereupon, in consideration that the plaintiff would forbear from taking such proceedings for an agreed time, the defendant promised to deliver to the plaintiff certain bonds. Averment of forbearance. Breach, non-delivery of the bonds. Plea, that at the time of the agreement no moneys were due to the plaintiff from H. *Held*, that the plea was bad; otherwise, if it had alleged that the plaintiff knew he had no claim against H. — *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449.

See CONTRACT, 1.

CONSTRUCTION.—*See* APPOINTMENT; ATTORNEY; BANKRUPTCY, 2; CHARITY; COMPANY, 2; CONTRACT, 2, 3; ESTATE TAIL; STATUTE; VENDOR AND PURCHASER, 2, 3; WILL.

CONTRACT.

1. The plaintiff, by G. & B., stockbrokers, sold to M., a stock-jobber, 100 shares of stock, to be settled for on the next account day. The defendant agreed with M. to "take in" for him 100 shares, i. e., to take the shares or deliver to him on a certain day the name of an unobjectionable purchaser to whom they should be transferred; if the name were not delivered, the vendor might sell out the shares. No such name was delivered; instead of it, M. gave G. & B. a memorandum, and on the same day it was arranged between the defendant and G. & B. that the delivery of the name by the defendant should stand over until required by them. It was found that the plaintiff was ready and willing to execute a transfer, but that the name delivered by the defendant was objectionable. The company being wound up, a call of £5 a share was made, and paid by the plaintiff. The action was brought to recover £500 so paid. *Held*, that there was a contract between the plaintiff, through his brokers, and the defendant, that the defendant would, when required, deliver a name, into which the shares might be transferred; that this contract was not performed by him, and that he was liable to the plaintiff for the amount of the call with interest. — *Allen v. Graves*, L. R. 5 Q. B. 478.

2. The defendants issued the following circular: "We are instructed to offer to the wholesale trade for sale by tender the stock in trade of E., and which will be sold at a discount in one lot. Payment to be made in cash. The tenders will be received and opened at our office," &c. The plaintiffs made the highest tender, but the defendants refused to accept it. *Held*, that there was no contract to sell to the person who should make the highest tender. — *Spencer v. Harding*, L. R. 5 C. P. 561.

3. The defendant, a merchant at Liverpool, sent to the plaintiffs, commission merchants at Mauritius, an order for sugar at a limited price, viz., "You may ship me 500 tons; . . . fifty tons more or less, of no moment, if it enables you to get a suitable vessel . . . I should prefer the option of sending vessel to London, Liverpool or the Clyde; but if that is not compassable, you may ship to either Liverpool or London." He also sent a telegram, received at the same time with the letter, "If possible,

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the ship to call for orders for a good port in the United Kingdom." The plaintiffs could obtain only 400 tons of sugar at the price fixed by the defendant, and they shipped this to London, where the defendant refused to receive it. Before the plaintiffs made any further purchase of sugar, they received a letter from the defendant countermanding his order. At Mauritius it is generally impossible to purchase so large a quantity of sugar from one seller, and it is generally necessary to purchase it at different times and in different parcels. *Held*, that the defendant meant to buy an entire quantity of 500 tons (fifty tons more or less), to be sent in one vessel; and that a smaller quantity being sent, he had a right to refuse to accept it. (Montague Smith, J., and Cleasby, B., dissenting.) (Exch. Ch.)—*Ireland v. Livingston*, L. R. 5 Q. B. 516; s. c. L. R. 2 Q. B. 99; 1 Am. Law Rev. 694.

See BANKRUPTCY, 2; COMPANY, 2; CONSIDERATION; SALE; SECURITY; VENDOR AND PURCHASER, 2, 3.

CONTRIBUTORY NEGLIGENCE.—*See* NEGLIGENCE, 3, 5.

CONVERSION.—*See* ATTORNEY.

COVENANT.—*See* LANDLORD AND TENANT; RAILWAY.

CRIMINAL LAW.—*See* BURDEN OF PROOF; STATUTE, 1.

CUSTOM.—*See* CONTRACT, 3.

DEBTOR AND CREDITOR.—*See* FRAUDULENT CONVEYANCE, 1; SECURITY.

DEDICATION.—*See* WAY.

DEMURAGE.—*See* SHIP.

DIRECTORS.—*See* COMPANY.

DISCOVERY.—*See* EQUITY PLEADING AND PRACTICE.

EASEMENT.

The plaintiff was in possession of certain land, upon which he built copper works, under an agreement with the defendant for a lease. There was an understanding between them that, so long as the plaintiff was a good customer of the defendant's canal, he might use the surplus water for the copper works. *Held*, that such an understanding was not the foundation of an equitable right to the use of the water.—*Bankart v. Tennant*, L. R. 10 Eq. 141.

EJECTMENT.—*See* LANDLORD AND TENANT.

EQUITY.—*See* COMPANY, 1; EASEMENT; WIFE'S SEPARATE ESTATE.

EQUITY PLEADING AND PRACTICE.

The testator's widow carried on his business under a direction in his will that she should have the option of doing so, and that his trustees should permit her, while carrying it on,

to have the entire use, disposal and management of all the capital in the business, and of his other personal estate. After her death the plaintiff brought a bill against the executor, alleging that he was a creditor of the widow's for goods supplied to her, and claiming a lien on the estate used in the business; an interrogatory called for an account of the testator's personal estate, and of the personal estate employed in the business, which the executor refused to answer. *Held*, that the executor should give the account.—*Thompson v. Dunn*, L. R. 5 Ch. 573.

See PARTITION.

ESTATE TAIL.

A settlor conveyed real estate to the trustees to the use of himself for life, remainder to the use of D. and his heirs; but if he died without issue, then to T. and his heirs, and if D. and T. died without issue, then to the issue of the settlor. D. died without issue in the lifetime of the settlor; T. died in the lifetime of the settlor, leaving issue. *Held*, that D. and T. each took an estate tail.—*Morgan v. Morgan*, L. R. 10 Eq. 99.

EVIDENCE.—*See* BILLS AND NOTES; BURDEN OF PROOF; CONTRACT, 1; NEGLIGENCE, 1, 3-6; PRINCIPAL AND AGENT.

EXECUTORIAL TRUST.—*See* WILL, 2, 4.

FALSE IMPRISONMENT.—*See* MASTER AND SERVANT.

FORBEARANCE.—*See* CONSIDERATION.

FOREIGN ENLISTMENT.

The 59 Geo. III. cap. 69, sec 7, enacts that if any person in His Majesty's dominions shall, without leave of His Majesty first obtained, "equip, furnish, fit out or arm" any vessel to be employed "in the service of any foreign prince, state or potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or part of any province or people," as a transport or store-ship, or to commit hostilities against any prince, state or potentate with whom His Majesty shall not be at war, the vessel shall be forfeited. An insurrection existed in Cuba; at Nassau the Salvador was supplied with provisions and water; various munitions of war were shipped, and with eighty passengers on board she sailed to Cuba; the passengers were landed, and erected a battery; while there, seeing a Spanish man-of-war passing, they abandoned the vessel, but as the man-of-war passed without seeing them, they took charge of her again. The vessel was

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seized on her return to Nassau. *Held*, that there was a fitting out or arming, within the meaning of the act; and that the vessel was employed in the service of insurgents, who formed part of the province or people of Cuba.

—*The Salvador*, L. R. 8 P. C. 218.

FORFEITURE.—*See* LANDLORD AND TENANT.

FRAUD.—*See* BANKRUPTCY, 1; COMPANY, 1.

FRAUDULENT CONVEYANCE.

1. A. made a voluntary settlement of certain property, after which he had not the means to pay his debts. *Held*, that the settlement could be set aside at the suit of a subsequent creditor; because, although there was no actual intent to defraud or delay creditors, that was its necessary effect.—*Freeman v. Pope*, L. R. 5 Ch. 589; s. c. L. R. 9 Eq. 206; 4 Am. Law Rev. 707.

2. A trader conveyed all his property to secure the payment of a debt of £450, and a further advance of £300. Seventeen months afterwards he became bankrupt. *Held*, that the conveyance was not fraudulent under the 13 Eliz. cap. 5, nor impeachable under the Bankrupt laws.—*Allen v. Bonnett*, L. R. 5 Ch. 577.

GIFT.—*See* WILL, 3.

HUSBAND AND WIFE.—*See* VENDOR AND PURCHASER, 1.

ILLEGITIMATE CHILDREN.—*See* WILL, 1.

IMPLIED CONTRACT.—*See* NEGLIGENCE, 7.

INDORSEMENT.—*See* BILLS AND NOTES.

INJUNCTION.—*See* RAILWAY.

INSANITY.—*See* TESTAMENTARY CAPACITY.

INSURANCE.—*See* SECURITY.

INTENT.—*See* BILLS AND NOTES; BURDEN OF PROOF; FRAUDULENT CONVEYANCE, 1.

INTEREST.—*See* PARTNERSHIP.

LANDLORD AND TENANT.

The plaintiff, in 1860, leased to T. and P. for fourteen years, and the lease contained a covenant "that the lessees shall not nor will underlet or assign or otherwise part with the possession of the premises," without the written consent of the lessor; with a clause of re-entry if the lessees should fail in the observance or performance of any of their covenants. In 1865 the plaintiff wrote a letter to W. saying, "I consent for you to take the two estates that T. and P. have been renting of me, on the same conditions and in accordance with their lease. This will be an authority for them to transfer the lease to you on paying £75, being three-quarters' rent due this day. P.S. It will be necessary for you to write accepting these terms." W. accepted the terms, and entered into possession without any assignment of the

term; he continued in possession two years, when by consent of the plaintiff he assigned his interest in the lease to trustees for his creditors, who sold the term to the defendant. *Held*, that there was no breach of covenant by T. and P. *Quære*, whether the proviso for re-entry applied to the breach of a negative covenant. (Exch. Ch.).—*West v. Dobb*, L. R. 5 Q. B. 460; s. c. L. R. 4 Q. B. 634; 4 Am. Law Rev. 293.

See EASEMENT.

LEASE.—*See* LANDLORD AND TENANT.

MARRIED WOMEN.—*See* WIFE'S SEPARATE ESTATE.

MASTER.—*See* BOTTOMRY.

MASTER AND SERVANT

H. was foreman, porter and superintendent of the defendants' station yard; he gave the plaintiff into custody on a charge of stealing the company's timber; the plaintiff was brought before a magistrate and discharged; he was then in the employ of the defendants, but was soon after discharged. *Held*, that H. had no implied authority to give a person into custody, and there was no evidence of a ratification of his act by the defendants.—*Edwards v. London and North Western Railway Co*, L. R. 5 C. P. 445.

MISREPRESENTATION.—*See* COMPANY, 1.

MORTGAGE.—*See* PRIORITY.

NEGLECT.

1. The plaintiff was passing along the highway under a railway bridge of the defendants, when a brick fell and injured him. A train had passed just previously. The brick fell from the top of a perpendicular brick wall, upon which the bridge rested on one side. *Held*, that this was *prima facie* evidence of negligence on the part of the defendants. (Hannen, J., dissenting).—*Kearney v. London, Brighton and South Coast Railway Co*, L. R. 5 Q. B. 411.

2. The defendant was part owner of a steamer, which ran from M. to L. Passengers went on board a hulk in the harbour at M., where they obtained their tickets, and upon the steamer's coming up, descended by a ladder to the main-deck, from which they got on board the steamer. The hulk did not belong to the owners of the steamer, but was used by them by agreement with the owner, for the purpose of embarking passengers. The plaintiff, in descending the ladder, fell down a hatchway, close to its foot, which had been negligently left open. *Held*, that the defendant was liable, on the ground that the defendant had held this out as a place for passengers to embark, and

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also on the ground that there was a contract to use due care for the plaintiff's safety during the journey from M. to L.—*John v. Bacon*, L. R. 5 C. P. 437.

3. The plaintiff was a passenger to D. on the defendants' railway, and was in the last carriage. The train stopped at D. late at night, with the body of the train alongside the platform, but the last carriage was opposite to and about four feet from a receding part of the platform, where passengers could not alight; the platform was long enough for the whole train to be drawn up alongside of it. The plaintiff stepped out, expecting to step on the platform, but fell on the rails and was injured. *Held*, by Bovill, C. J., and Brett, J., that there was evidence for the jury that the injury arose from the negligence of the defendants; *held*, by Montague Smith and Keating, JJ., that there was no evidence of negligence on the part of the defendants, and that the plaintiff contributed to the accident by her own negligence.—*Cockle v. London and South Eastern Railway Co.*, L. R. 5 C. P. 457.

4. A train of the defendants' drew up at a station so that the last carriage, in which B. was a passenger, was in a tunnel which terminates at the station, and not at the platform. The name of the station was called out by a porter, and B. immediately got out, though it was dark, and fell on the rails. *Held*, that there was no evidence of negligence on the part of the defendants.—*Bridges v. North London Railway Co.*, L. R. 5 C. P. 495, n. (5).

5. A train on the defendants' railway drew up at a station so that the carriage in which the plaintiff was a passenger was opposite to the platform at a part where it curved back, leaving an interval of two feet between the carriage and the platform. The name of the station had been called, and the plaintiff stepped out and fell between the carriage and the platform. *Held*, that the conduct of the plaintiff amounted to contributory negligence, and that a non-suit should be entered.—*Prayer v. Bristol and Exeter Railway Co.*, L. R. 5 C. P. 460, n. (1).

6. A train of the defendants', in which the plaintiff was riding, overshot the platform, so that the carriage in which he was sitting was opposite to the parapet of a bridge beyond the platform, the top of which in the dusk looked like the platform; the porter called out the name of the station, and the plaintiff, having got out upon the parapet in the belief that it was the platform, fell over and was injured. *Held*, that there was evidence of an invitation

to alight at a dangerous place, and evidence of negligence of the engine-driver, in not stopping at the platform.—*Whittaker v. Manchester and Sheffield Railway Co.*, L. R. 5 C. P. 464, n. (3).

7. The defendant was one of several gentlemen interested in steeple-chases, and was appointed to cause a stand to be erected for the purpose of viewing the races; he employed a competent person to erect it, and stationed a man at the door to admit any one upon payment of 6s. The plaintiff paid 6s., and went upon the stand; it was improperly constructed and insufficient for the purpose, and for that reason gave way and fell while the plaintiff was there, whereby he was injured. *Held*, that there was an implied contract between the plaintiff and defendant that the stand was reasonably fit for the purpose for which it was to be used, and that the defendant was liable for the consequences of its not being so fit. (Exch. Ch.)—*Francis v. Cockrell*, L. R. 5 Q. B. 501; s. o. L. R. 5 Q. B. 184; 4 Am. Law Rev. 717.

See COLLISION.

NEGOTIABLE INSTRUMENT.—*See* BILLS AND NOTES. NOTION.—*See* PRIORITY.

PARTITION.

Upon a suit for partition, where the plaintiffs had not been in possession for many years, the court refused to decide the legal title to the land, and ordered the bill to be retained for a year, with liberty to the plaintiffs to bring an action.—*Gifford v. Williams*, L. R. 5 Ch. 546; s. o. L. R. 8 Eq. 494; 4 Am. Law Rep. 476.

PARTNERSHIP.

Partnership articles between the plaintiffs and defendant provided that they should be allowed interest at five per cent. upon the amount of capital contributed by them respectively, and that, upon the determination of the partnership, the value of the plaintiff's share should be ascertained by two persons, one to be chosen by each partner, and the defendant should purchase it at that valuation. *Held*, that, although the valuation could not be made in the manner provided, because there was no umpire, the court would make the valuation and carry out the agreement; also that the undivided profits should not be treated as capital in computing interest on the capital.—*Dinham v. Bradford*, L. R. 5 Ch. 519.

See ATTORNEY; BANKRUPTCY, 1.

PASSENGER.—*See* NEGLIGENCE, 2-6.

PAYMENT.—*See* PRINCIPAL AND AGENT.

PLEA.—*See* BILLS AND NOTES; CONSIDERATION.

PLEDGE.—*See* ATTORNEY.

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POWER.—*See* APPOINTMENT.

PRINCIPAL AND AGENT.

Action by the lord of a manor to recover £78 15s., for a fine payable by the defendant, on admission as tenant to a copyhold. The defendant was admitted by C., who had been appointed by the steward of the manor, to act as his deputy for that turn. C. also acted as the defendant's attorney in the purchase of the land. After the admission, the defendant gave C. a cheque for £87 10s. 6d., being the amount of the lord's fine, steward's fees, and C.'s charges as the defendant's solicitor. At C.'s request he crossed the cheque with the name of C.'s bankers, to whom the cheque was duly paid by the defendant's bankers. C. became insolvent soon afterwards. *Held*, that as the cheque had been paid, it was the same as payment in cash; and that there was evidence of payment for the jury. (Exch. Ch.)—*Bridges v. Garrett*, L. R. 5 C. P. 451; s. o. L. R. 4 C. P. 580; 4 Am. Law Rev. 297.

See ATTORNEY; CONTRACT, 1, 3; MASTER AND SERVANT; NEGLIGENCE, 2, 7.

PRIORITY.

The plaintiff, being mortgagee of certain leasehold property, lent the lease to the mortgagor, to enable him to raise money by a second mortgage, but told him to inform the second mortgagee of the first mortgage. The mortgagor borrowed money of his banker's, and deposited the lease as security, without giving any notice of the prior mortgage. *Held*, that the plaintiff's mortgage must be postponed to the claim of the bankers—*Briggs v. Jones*, L. R. 10 Eq. 92.

RAILWAY.

The plaintiff's grantors sold a piece of land to a railway company, which agreed that it should forever be used as a "first-class station;" a station was accordingly built, and a railway was opened in 1842. In 1869, the plaintiff filed a bill alleging that the accommodation was insufficient, and that only a small number of trains stopped there. *Held*, that as the station had stood so long without complaint, it must be presumed that the building was originally satisfactory; also that a "first-class station" was not to be construed to mean a first-class building, but a place where there were as many advantages for stopping as at any other place on the line; and the defendants were restrained from stopping a less number of trains at this station than at any other station between the termini, excepting express, special, or mail trains.—*Hood v. North Eastern Railway Co.*, L. R. 5

Ch. 525; s. o. L. R. 8 Eq. 666; 4 Am. Law Rev. 478.

See MASTER AND SERVANT; NEGLIGENCE, 1, 8-6.

SALE.

The defendants' agents in Valparaiso purchased for them a cargo of soda, and chartered the Precursor to bring it to England; the soda was soon after destroyed by an earthquake, and the agents thereupon cancelled the charter. Afterwards the defendants, being ignorant of the destruction, sold to the plaintiff the soda, "being the entire parcel of nitrate of soda expected to arrive at port of call per Precursor. . . . Should any circumstance or accident prevent the shipment of the nitrate, . . . this contract to be void." The defendants' agents, upon hearing of this contract, bought another cargo of soda, and shipped it by the Precursor to England. *Held*, that the contract did not apply to the soda which arrived, the voyage by which it was brought not being the voyage intended by the contract—*Smith v. Myers*, L. R. 5 Q. B. 429.

See CONFIDENTIAL RELATION; CONTRACT, 3. SECURITY.

K. sold an annuity to T. for the life of K., and covenanted to attend at an insurance office in order to have his life insured by T., and if he went beyond the seas to pay any sums which T. might be obliged to pay as additional premiums; it was also provided that K. might repurchase the annuity at any time at its original price. T. insured K.'s life; afterwards K. repurchased the annuity and claimed the policy. *Held*, that the policy was the property of T., and K. was not entitled to have it assigned to him.—*Knox v. Turner*, L. R. 5 Ch. 515; s. o. L. R. 9 Eq. 155; 4 Am. Law Rev. 718.

SETTLEMENT.—*See* APPOINTMENT; ESTATE TAIL; FRAUDULENT CONVEYANCE, 1.

SHIP.

The defendant chartered a ship to take in a cargo and proceed to a certain port, "and there, or so near thereto as she may safely get, deliver the said cargo in the usual and customary manner." At that port goods can only be landed in lighters, which are furnished by the merchant. The authorities there refused for several days to allow the cargo to be landed, owing to a threatened bombardment of the port. *Held*, that the ship-owners could not maintain an action against the defendants for the delay. (Exch. Ch.)—*Ford v. Cotenworth*, L. R. 5 Q. B. 514; s. o. L. R. 4 Q. B. 127; 8 Am. Law Rev. 715.

See BOTTOMRY; COLLISION; FOREIGN ENLISTMENT.

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SOLICITOR.—*See* CONFIDENTIAL RELATION.

SPECIFIC PERFORMANCE.—*See* PARTNERSHIP;

RAILWAY; VENDOR AND PURCHASER.

STATUTE.

1. The 6 & 7. Wm. IV. cap. 37, enacts that bread shall be sold by weight, and in case any baker "shall sell or cause to be sold bread in any other manner than by weight," such baker shall pay a fine. H. was a baker, and in making a 3½ lb. loaf, used to put 4 lbs. of dough into the oven, but did not weigh it after baking. Six of such loaves sold by him, were found to weigh on an average not more than 8½ lbs. each. Upon these facts he was convicted. *Held*, that the conviction was right, the bread never having been weighed.—*Hill v. Browning*, L. R. 458.

2. By 3 Geo. IV. cap. 126, sec. 41, if any person shall leave upon any turnpike road any horse, cattle, beast or carriage whatsoever, by reason whereof the payment of any tolls or duties shall be avoided or lessened, he shall pay a fine. S. was driven by his coachman in a waggonette more than a quarter of a mile along a turnpike road to within about 140 yards of the turnpike gate, and he then got out and walked through the gate to a railway station, which was about 100 yards beyond; the waggonette was driven back by the coachman. *Held*, that "leaving" a carriage, in the sense of the statute, did not mean "quitting" it, and that the conduct of S. was not within the statute.—*Stanley v. Mortlock*, L. R. 5 C. P. 497.

See BURDEN OF PROOF; FOREIGN ENLISTMENT; FRAUDULENT CONVEYANCE.

TENANCY IN COMMON.—*See* PARTITION.

TESTAMENTARY CAPACITY.

A testator was subject to two delusions, one that a man, who had been dead for some years, pursued and molested him, and the other that he was pursued by evil spirits, whom he believed to be visibly present. It was admitted that at times he was so insane as to be incapable of making a will. *Held*, that the existence of a delusion compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it were such as was calculated to influence the testator in making it.—*Banks v. Goodfellow*, L. R. 5 Q. B. 549.

TITLE.—*See* VENDOR AND PURCHASER, 2, 3.

TROVER.—*See* ATTORNEY.

TRUST.—*See* CHARITY, 1; WILL.

USAGE.—*See* CONTRACT, 3.

VENDOR AND PURCHASER.

1. Husband and wife agreed to convey real estate of the wife; the wife afterwards refused

to convey. *Held*, that as the purchaser knew it was the wife's estate, the husband could not be compelled to convey his partial interest, and submit to an abatement of the price.—*Castle v. Wilkinson*, L. R. 5 Ch. 534.

2. The defendants sold by auction to the plaintiff a lot of land containing limestone and freestone; the conditions of sale provided that "if any objection or requisition be delivered and persisted in, the vendor shall be at liberty to rescind the contract," on returning the deposit; and that if there should be any mistake in the description of the property or the vendor's interest, it should not vacate the sale, but a compensation should be made. The lot was found to be subject to the right of the lord of the manor to the mines and minerals thereunder, and the plaintiff claimed compensation therefor; the defendants refused, and, the plaintiff persisting in his claim, they rescinded the contract and returned the deposit. *Held*, that under the conditions of sale, the defendants were at liberty to rescind the contract.—*Mawson v. Fletcher*, L. R. 10 Eq. 812.

3. An agreement between the plaintiffs and defendant for the sale of a piece of land, provided that the purchaser should send in writing to the vendors within a limited time all his objections and requisitions in respect of the title; and that in this respect time should be of the essence of the contract, and in default of such objections and requisitions, and subject only to such, the purchaser should be deemed to have accepted the title. Requisitions were sent to the vendors within the time, and disputes arising, a suit for specific performance was brought by the vendors. *Held*, that the purchaser was precluded by the agreement, from taking, under the inquiry, objections other than those taken within the specified time.—*Upperton v. Nickolson*, L. R. 10 Eq. 228.

See CONFIDENTIAL RELATION.

VOLUNTARY CONVEYANCE.—*See* FRAUDULENT CONVEYANCE, 1.

WARRANTY.—*See* NEGLIGENCE, 7.

WAY.

A foot-path along the top of the river wall, which is maintained by the commissioners of sewers for the purpose of keeping out the water of the Thames from the marsh lands, had been used by the public without interruption from time immemorial. *Held*, that there was nothing in the river wall necessarily inconsistent with the user of a foot-path at the top.—*Greenwich Board of Works v. Maudslayi*, L. R. 5 Q. B. 397.

DIGEST OF ENGLISH LAW REPORTS.

WIFE'S SEPARATE ESTATE.

A married woman, living alone at Paris, and to all appearance a *feme sole*, indorsed a bill drawn by her agent, and drew a cheque on her bankers payable to her agent or bearer. The plaintiff cashed both the bill and the cheque, which were afterwards dishonored. *Held*, that her separate estate was liable for the amount due on the bill and cheque, without any deduction on account of equities between her and her agent.—*McHenry v. Davies*, L. R. 10 Eq. 88.

WILL.

1. Testator gave real and personal property in trust for his wife M, for her life (provided she continued his widow and unmarried), and after her decease to be divided among all his children if more than one; and if there should be but one such child, then the whole to go to such child. He had a wife E, who survived him, by whom he never had any children, and from whom he had lived apart for many years. For several years he had lived with one M., who was recognised by him as his wife, and bore his name, and by whom he had four children; two of them died before the date of the will, one was then alive, and one was born afterwards; these children were baptised as his children and bore his name. *Held*, that M. was entitled to the benefit of the trust for life, and after his decease the property went to the child living at the date of the will.—*Lepine v. Bean*, L. R. 10 Eq. 160.

2. Testator gave real estate to trustees, upon trust to convey to his son T. F. and the heirs of his body, but in such manner and form nevertheless, and subject to such limitations and restrictions, as that if the said T. F. shall happen to depart this life without leaving lawful issue, then that the said real estate may after his decease descend unincumbered to R. F. and her heirs. *Held*, that the will created an executory trust, to be executed by a conveyance to the use of T. F. for his life, with remainder to his first and other sons and daughters in tail, with remainder to R. F. in fee.—*Thompson v. Fisher*, L. R. 10 Eq. 207.

3. Testator gave an estate upon trust for his son for his life, and after his decease upon trust to convert into money and divide the same among the testator's eleven grandchildren, *nominatim*, when they should respectively attain twenty-one; and if any of such grandchildren should die before such share should become payable without leaving any child surviving, then the share of him so dying should be divided among the survivors; and

in case any of them died before his share became payable, leaving any child surviving, then his share should go to his children. The eleven grandchildren all survived the testator and attained twenty-one, but several died in the lifetime of the tenant for life. *Held*, that "payable" should be construed to mean "vested," and that the shares of the grandchildren who had died were payable to their personal representatives.—*Haydon v. Rose*, L. R. 10 Eq. 224

4. A. devised real estate to trustees, in trust for her sister D. for life, and after her decease in strict settlement to the use of the eldest, third and other sons of D. for their respective lives, without impeachment for waste, remainder to their sons successively in tail male. Afterwards the Crown granted a barony to D. for life, remainder to her second, third, and other younger sons in tail male; the patent contained a shifting clause by which, in the event of any of the sons succeeding to the Earldom of D., the barony should devolve upon the next son. A. then made a codicil, which recited that it was her intention to settle the property disposed of in her will "in a course of settlement to correspond, as far as may be practicable, with the limitations of the said barony," and gave her estates, &c., to trustees upon trust, "to convey, settle and assure all the same manors and hereditaments, &c., in a course of entail to correspond as nearly as may be with the limitations of the said barony," and the provisos affecting it, "in such manner and form, and with all such powers," &c., as the trustees or their counsel should advise. *Held*, that the estates ought to be settled in a course of strict settlement to the second and other younger sons of D. for their respective lives, without impeachment of waste, remainder to their first and other sons in tail male; and that the settlement should contain a shifting clause in the words of the patent (Lord Hatherly, L. C., dissenting).—*Sackville-West v. Viscount Holmesdale*, L. R. 4 H. L. 543.

See CHARITY; TESTAMENTARY CAPACITY.

WORDS.

"Any other religious institution or purposes"—

See CHARITY, 2.

"Children."—See WILL, 1.

"Correspond."—See WILL, 4.

"Course of entail."—See WILL, 4.

"Dying without issue."—See ESTATE TAIL.

"Expected to arrive."—See SALE.

"Furnish, fit out, or arm."—See FOREIGN ENLISTMENT.

OBITUARY—REVIEWS.

"First-class Station."—See RAILWAY.
 "Leave."—See STATUTE, 2.
 "Payable."—See WILL, 3.
 "Sale by weight."—See STATUTE, 1.
 "Transaction."—See BANKRUPTCY, 2.
 "Wife."—See WILL, 1.

OBITUARY.

JOHN SHUTER SMITH, ESQ.

Died, at his residence, Wildwood, Port Hope, on Wednesday, the 18th January last, in the 57th year of his age, JOHN SHUTER SMITH, Esq., Barrister at Law.

Mr. Smith was descended from an U.E. Loyalist, being the third son of Mr. J. D. Smith, nearly fifty years ago a member of the Parliament of Upper Canada, and a prominent man in the neighbourhood of Port Hope. His brother, is the County Judge of Victoria; the Hon. Sidney Smith, Inspector of Registry Offices, and several other brothers and sisters, survive him.

Mr. Smith, in 1831, commenced the study of the law, in the office of the late Hon. George S. Boulton, of Cobourg, and finished his time in that of Hon. M. S. Bidwell, at Toronto. In 1836 he was called to the bar, and practised with much success in Toronto for several years, as senior member of the firms of "Smith & Crooks," and "Smith, Crooks & Smith," his partners being the late Robt. P. Crooks and Larratt W. Smith, Esqs.; and again with the late Mr. Justice Sullivan and J. Hector, Esq., as "Sullivan, Smith & Hector;" and afterwards, at Cobourg, with the Hon. Sidney Smith, and at Port Hope with the present Judge Smith, of Lindsay, as "Smith & Smith."

At the latter place he entered into politics in the Reform interest, and, though unsuccessful at first, was on two occasions elected for East Durham.

In Michaelmas Term he was appointed a Benchman of the Law Society at the same time as Mr. Becher, Mr. Vice-Chancellor Mowat, and the late Mr. Henry Eccles.

He was appointed Registrar of the Court of Chancery, in 1854, and held the office but for a few months. In January, 1868, he was appointed Clerk of the Legislative Council of Ontario, and continued therein till the beginning of the year 1869, when he was seized with the illness which has just terminated with his life.

HON. JOHN ROSS, Q. C.

Died at his residence, in the township of York, on Tuesday, the 31st January, 1871, the Hon. JOHN ROSS, in the 53rd year of his age.

We shall give some particulars of his life hereafter.

REVIEWS.

SCIENTIFIC AMERICAN. Munn & Co., New York, U. S.

We publish in another place the prospectus of this very interesting and instructive journal.

It occupies a space filled by no other periodical, keeping us *au courant* with all that takes place in the scientific and mechanical world, containing information which can nowhere else be obtained. The plates given in it are admirably executed, and are an evidence of the enterprise of the publishers.

ALBANY LAW JOURNAL.

With the first number of the third volume comes the Title page and Index to Vol. II.

This is one of the most readable of our exchanges, perhaps the most so, and is admirably conducted by Mr. Isaac Grant Thompson, but why is it that it, like so many other legal periodicals and law books, fails in its Index? There seems to be a general want of care on this most important point on this side of the Atlantic. Few, if any, are what they should be, or might be. The defect in the one before us is, that there scarcely seems to have been any attempt made to index the *subjects* in alphabetical order; the alphabetical arrangement having reference only to the catch heading of each article or item. We are the more sorry for this, as it will deprive the volume of much of its practical value to those who keep it, as we do, for binding, and to be placed in an easily accessible place on our library shelves. The publishers promise additional matters of interest for subscribers for 1871; and possibly if the enterprising conductor of this Journal thinks our hint of any value, he may take advantage of it. Our only desire is to save so much that is valuable and interesting from being practically lost.

By 32-33 Victoria, cap. 29, sec. 38, which took effect on 1st January, 1870, it is enacted that "in all criminal trials, whether for treason, felony or misdemeanor, four jurors may be peremptorily challenged on the part of the Crown; but this shall not be construed to affect the right of the Crown to cause any juror to stand aside until the panel has been gone through, or to challenge any number of jurors for cause."—*Held*:—1. That even before 1st January, 1870, on a trial for a misdemeanor, the Crown might, without showing cause, direct jurors, on their names being called by the clerk of the court, "to stand aside," until the panel has been gone through. 2. Illegal evidence allowed to go to the jury under reserve of objection may be subsequently ruled out by the judge in his charges and the conviction is not invalidated thereby, if it does not appear that the jury were influenced by such illegal evidence. 3. The Court of Queen's Bench in Appeal will adjudicate upon a reserved case of misdemeanor in the absence of the defendant who has fled beyond the jurisdiction of the court.—*The Queen v. Fraser*, 14 L. C. J. 245.

ELECTION OF BENCHERS.

DIARY FOR MARCH.

1. Wed. *St. David.* Last day for County Clerk to transmit to Chief Superintendent audited school account.
5. SUN. *2nd Sunday in Lent.*
7. Tues. *Shrove Tuesday.* Last day for notice of Trial for County Court, York.
12. SUN. *3rd Sunday in Lent.*
14. Tues. General Sessions and County Court sittings in York.
17. Frid. *St. Patrick's Day.*
19. SUN. *4th Sunday in Lent.*
25. Sat. *Annunciation.*
26. SUN. *5th Sunday in Lent.*
31. Frid. Last day for Local Superintendent of Common Schools to complete first half-yearly visits to schools.

THE

Canada Law Journal.

MARCH, 1871.

ELECTION OF BENCHERS.

There are three prominent characteristics in mankind in the present age of the world. Firstly—Those who are so infatuated with the belief that nothing new can be and that everything old must be good, and so fearful of changes that they cannot tolerate any alteration in the present state of things. Secondly—Those who, when a change is from any reason or combination of circumstances rendered necessary or inevitable, are willing after a fair trial of the old machinery, by degrees, warily and carefully, to alter, rectify and remodel it; and lastly, those who, when there is some slight disarrangement in detail, some part inefficient or effete, with axe in hand, rush blindly at the machine, and after hewing it in pieces, endeavour out of the wreck to construct something which they imagine will be better than the old.

Of the first class there are but few, and though we may respect them for their large development of the organ of veneration, we cannot wish to see more of them than are necessary to act somewhat in the same way as fly wheel does in a steam engine.

The third class are at the other extreme, and unhappily rather numerous—of them beware, for their tendency is towards primeval chaos, disintegration and ruin.

Let not any of our readers now thoughtlessly exclaim that we are trenching on politics, of such matters we are profoundly ignorant, and though we have smelt the 'smell of it in

this matter it is offensive to all those who wish the profession well; and we only allude to these peculiarities of human nature in so far as they affect the individual members of our honorable profession, which as a whole is, we fondly trust, composed of the second or moderate class we have above alluded to. There may of course be a few stray ones of the destructive class, but they are too few to be worth considering.

Certain changes have been made in the mode of appointing the governing body of our Law Society. Whether these changes have been brought about by the second or third class spoken of above, or by means of influences outside the Society, or a little of all three, it is not our present purpose to enquire; the fact may be accepted without further comment, except to keep in view that we have to do with a new state of things where moderation, caution, and mutual forbearance are essential to our future well-being. In other words, it now becomes our duty so to work the new Act respecting the appointment of the governing body of the Law Society, that such Society may hereafter receive the respect and confidence it has hitherto enjoyed; and we may at the same time express a hope that whatever our difficulties may be, it may derive from the new system an increase of vigor and activity.

In making the selection of Benchers it must never be forgotten, that to that body the Bar and the public have in a great measure to look for the maintenance of a high standard of professional feeling and professional morality, both in the admission of members and in the supervision of their conduct as practitioners.

To secure this the Benchers to be selected should be those who from their attainments, integrity, and position at the Bar, will command the respect and confidence as well of their brethren as of the public at large; and though younger blood may usefully be infused, age and experience are most important elements in the formation of a good Bench; and we speak not only of the experience arising from length of years, but also that which has been gained from a practical knowledge of the working of the Society in times past.

There are, we believe, seven gentlemen who are by virtue of the Statute *ex-officio* Benchers, having held the office of Attorney or Solicitor-General, viz:—Sir John A. Macdonald,

ELECTION OF BENCHERS—PAYMENT OF EXECUTORS.

John Hillyard Cameron, John Sandfield Macdonald, Lewis Walbridge, James Patton, Jas. Cockburn and Albert N. Richards, but of these Mr. Cameron is the only one whose home is in Toronto; and this is important in considering where the Benchers are to come from. In distributing the thirty Elective Benchers between Toronto and the Country it would seem proper to give about one-half to Toronto; and a little reflection will shew that this number is not excessive, because, in the first place, although the Toronto Bar does not exceed one-third of the whole, yet the burden of the routine work of the Society must unavoidably fall, and always has fallen on Toronto men, and also because the preponderance of *ex-officio* Benchers from the Country will make the proportions almost equal. It must moreover be borne in mind that the Election is of Benchers to represent the Profession as a body, and not any particular town or place, and the object should therefore be, not to attempt to represent this and that locality, so much as to secure those who will be the right men in the right place.

Several prominent members of the Bar have taken the matter up in a very proper and professional spirit, and will endeavour if possible in their different localities to bring before their brethren a list of names which will be generally acceptable, and which is intended, to use the words of a circular emanating from the Hamilton Bar, "to bring before the profession generally a list which at all events shall have obtained the approval of a large number of members and yet shall leave every Barrister free to reject any name or all." It would be a great thing for the Bar to be able to say that they had elected their representatives at Convocation without any of those unseemly contests and squabbles that flow so naturally from elective institutions—a possible result which formed one of the great objections to the recent act.

The question as to whether County Judges and others, such as the Clerks of the Crown and Pleas in Toronto, the Master in Chancery and Referee in Chambers, and other Barristers who pay no bar fees, are eligible as Benchers, has been decided in the negative. The Secretary of the Law Society did not put their names on the list, thinking that as they did not pay these fees they were not eligible under section 11 of the Act. The matter was then brought before the scrutineers by one of the conductors of this Journal by way of appeal

under section 12, but the scrutineers sustained the list as made out by the Secretary. We are sorry for this, as many of the persons who are thus held ineligible would make excellent Benchers, but whilst their services are lost for the present it may result in an amendment of the law whereby some of them may be appointed *ex-officio* Benchers, and thus save the necessity of any election of those whose names, owing to the position they hold, it would not perhaps be pleasant to have on the lists as possible contestants.

The election about to take place is of vital moment to our future well-being, not only in respect of the internal management of the Society but because the election of a body of men who would not command general respect and confidence would be a dangerous weapon in the hands of those who might hereafter desire to throw open the Profession.

We have every reason to be proud of a Law Society second to none in the world. Let us heartily unite in striving if possible after a greater measure of success, for that country may well be happy that has an independent and honorable Bar, and a Bench beyond reproach.

PAYMENT OF EXECUTORS.

FIRST PAPER.

On the 1st September, 1858, the law came into force touching compensation to executors and others, which is now embodied in the Consolidated Statutes of Upper Canada, cap. 16, sec. 66. This section provides that the judge of any Surrogate Court may allow to the executor, or trustee, or administrator acting under will or letters of administration, a fair and reasonable allowance for his care, pains and trouble; and his time expended in or about the executorship, trusteeship, or administration of the estate and effects vested in him under any will or letters of administration, and in administering, disposing of and arranging and settling the same, and generally in arranging and settling the affairs of the estate, and therefor may make an order or orders from time to time, and the same shall be allowed to an executor, trustee or administrator in passing his accounts.

Prior to this enactment the English rule obtained in this Province, that in all matters of trust, or in the nature of a trust, whether testamentary or otherwise, the trustee was not

PAYMENT OF EXECUTORS.

entitled to any remuneration whatsoever for his pains, trouble and personal services. There are some English cases to be found pointing in an opposite direction, such as *Marshall v. Holloway*, 2 Swanst. 452; *Ex. p. Fernor*, Jac. 404; *Newport v. Bury*, 23 Beav. 80. These have been usually considered as cases of special exception, but may perhaps be viewed as instances wherein the rule has been properly relaxed, on the ground that compensation had been intended.

The English Courts, however, did not consider the rule in question applicable to their Colonial possessions. In many cases touching both East and West Indian estates, a commission of five per cent. has been allowed to the Indian executor, upon passing his accounts in the English Courts: *Chetham v. Audley*, 4 Ves. 72, in which five per cent. was allowed upon the payments made on account of the estate: *Cockerell v. Barber*, 1 Sim. 23 S. C. in appeal, 2 Rus. 585, in which five per cent. was allowed on all assets collected by the executor in East India, including assets retained by him for a legacy to himself, not given to him as executor,

In *Matthews v. Bagshaw*, 14 Beav. 123, five per cent. was allowed on the gross receipts of the East Indian assets. There the Master of the Rolls laid it down, that by the custom of India, which the law of England will follow, Indian executors are entitled to five per cent. on the gross sum received by them. (A note to this case shews that this custom was abolished in 1849.) See also *Campbell v. Campbell*, 18 Sim. 168; and 2 Y. & C. 607. Similar allowances have been sanctioned as to West Indian estates on the ground among others that such was the constant course of practice in those colonies—a practice indeed in some of the islands which was recognized and regulated by the acts of colonial legislatures. See *Denton v. Dacey*, 1 Moo. P. C. 15; *Chambers v. Goldwin*, 9 Ves. 254, 267. In this case it is said that the commission is the reward of personal care and attention, and if that care and attention are not administered, the unquestionable principle of the Court is that not being within the case, upon which the commission can be claimed, the executor is in the situation of a person entitled only to the commission actually paid to those who really managed the estate: *Forrest v. Elwes*, 2 Mer. 68.

The like principle of compensation to executors has been declared by the Legislatures of many of the States in the American Union. Thus for instance in New York State an Act was passed in 1817, declaring that in settling the accounts of guardians, executors and administrators, the Court of Chancery should make a reasonable allowance to them for their services over and above their expenses, to be fixed by a general rule of the Court in that behalf. Upon this the Chancellor passed a general order providing a scale of per-centages by way of commission, as follows:—For receiving and paying out money, five per cent. on all sums not exceeding \$1,000; two and a half per cent. upon all sums between \$1,000 and \$5,000; and one per cent. for all above \$5,000. The mode adopted of computing the allowance was to reckon two and a half, one and a quarter, or a half per cent., according to circumstances on the aggregate amount received; and the same in respect of the aggregate amount expended. Thus if \$10,000 had been collected, the per centage on \$1,000 would be \$25, on 4,000 would be \$50, and on \$5,000 would be \$25; total amount allowed, \$100, and the same scale of allowances on the amount paid out. These regulations were afterwards changed upon legislative interference, and the rules in New York are now settled by the revised statutes of 1852, in which it is provided that “on the settlement of the account of an executor or administrator the Surrogate shall allow to him for his services, and if their be more than one, shall apportion among them, according to the services rendered by them respectively, over and above his or their expenses:—

“1. For receiving and paying out all sums of money not exceeding one thousand dollars at the rate of five dollars per cent.

“2. For receiving and paying any sums exceeding one thousand dollars and not amounting to five thousand dollars, at the rate of two dollars and fifty cents per cent.

“3. For all sums above five thousand dollars at the rate of one dollar per cent.; and in all cases such allowance shall be made for their actual and necessary expenses as shall appear just and reasonable.”—*Rev. St. N. Y., Tit 8, Part II., Cap. VI., Sec. 64.*

The manner of estimating the allowance is, and always has been the same in the New York Courts—that is to say, full per-centages

PAYMENT OF EXECUTORS—LAW SOCIETY EXAMINATIONS.

are not reckoned both on the receipts and disbursements: one half commission is allowed on the amount received, and one half on the amount paid out. Their practice in ordinary cases is to reckon commission upon the aggregate amount of the receipts and expenditures for the whole period of accounting. Where however an account is taken with annual rests for the purpose of charging interest on the yearly balances, then the commission is computed upon the aggregate amount of receipts and disbursements during each year. — *Vanderheyden v. Vanderheyden*, 2 Paige, O. R. 287.

It may be noticed that these provisions and regulations of the New York law are objectionable in extending merely to the receipt and payment of money, and in not providing any allowances for care and trouble in the management of the estate. And apart from this consideration, many cases will occur in which the rate allowed may on the one hand prove inadequate, or on the other hand, exorbitant. It would seem the better course not to fix the remuneration by the terms of an inflexible tariff, which must be equally applied to all estates, however varied in their circumstances and however differing in the degrees of skill, care and responsibility, requisite on the part of the executors. In Canadian practice accordingly, the rate of compensation has been left to the judgment of the officer of the Court, who exercises his discretion upon a survey of all the special features of each case.

In our next paper we shall comment upon the scope of the Canadian Act, and collect the decisions thereupon.

LAW SOCIETY EXAMINATIONS.

HILARY TERM, 1870.

The examination papers of the students last Term shew, on the whole, a marked improvement over previous years. The Attorneys' examination was remarkably good, the first man being very near the maximum, and it may not be saying too much to attribute this improvement over former years to the present system of education, which is now beginning to bear fruit. The Law School and the intermediate examinations all tend in the same direction, and as time goes on the benefits will be more and more perceptible.

The following gentlemen were called to the Bar:

Messrs. Jas. J. Foy, Toronto; S. B. Clarke, Perth: (without oral) J. R. Cartwright, Kingston; J. F. Bain, Perth: W. W. Evatt, Port Hope; J. G. Ridout, Toronto; W. Boggs, Cobourg; G. L. Tizard, Toronto; G. M. Cox.

And the following were admitted to practise as Attorneys:

Messrs. J. Muir, Kingston; J. J. Foy, Toronto; J. Akers, Toronto; J. Taylor, London; J. F. Bain, Perth; J. Masson; W. H. Bartram; D. McGibbon, Toronto; A. Lindsay, Toronto; J. G. Ridout, Toronto; W. W. Evatt, Port Hope; G. L. Tizard, Toronto; G. E. Corbould, Toronto; J. A. Gemmell, Ottawa; J. G. Hall, Port Hope; W. F. Walker; R. H. Caddy; C. C. Backhouse; G. M. Cox.

The intermediate examinations were also exceedingly good, as will be seen from the following lists. The maximum number of marks both in the third and fourth years was 240. The successful candidates in the third year were seventeen in number out of twenty who went up. We give the names of those who made over two-thirds: Biggar, 224; Smith, 216; McKenzie, 208; Kingsford, 180; Hall, 175; Macdonald, 168; McQuesten, 167; McMillan, 162; Ball, 161.

It is worthy of remark that the first seven of these, with the exception of Mr. Hall, are University men. Let not therefore those who can in any way afford the expense of a University education imagine that it is not without its benefits, even in connection with the study of the law. It is not however our purpose at present to dilate upon the advantages of a University course, but the profession will be none the worse for being recruited mainly from those who have received the most liberal education that the country can offer.

The gentlemen who head this list, and Mr. White, of the fourth year, could scarcely have done better. We notice also that number six on the list in the third year seems determined to follow in the footsteps of his talented and learned father the Minister of Justice, for he takes a very good place, considering that that part of the time which would have been most valuable to him for reading was devoted to working his way to Manitoba and back as a volunteer in the Red River expedition.

In the fourth year Mr. White, who is also a University man, is only one mark behind Mr. Biggar. He makes 223; Ritchie, 213; Bowes, 195; Bleecker, 193; Akers, 186; Burritt, 184; McDonell, 182; Strathy, 166;

ILLNESS OF THE CHANCELLOR—HON. S. B. NEWCOMB—ACTS OF LAST SESSION.

and Platt, 168. These are very good papers, better on the average than the third year, though of course this is only as it should have been. In this year twenty-two students went up, of whom only four were rejected.

ILLNESS OF THE CHANCELLOR.

We are glad to learn that Mr. Spragge is slowly recovering from the alarming illness which for some time cast a gloom over Osgoode Hall. At one time fears were entertained for his life, but there has been a great change for the better, and there is a good prospect of his being spared to the country for many years to come; he must, however, be very careful not to return to his duties too soon. He has never spared himself, and for this reason, if for none other, he may feel assured that a little extra caution now will be more acceptable to his brother judges, the profession, and the public, however much they may feel the loss of his services, than a hurried rest and a speedy return to work.

Our readers in the Counties of Elgin and Oxford may be glad to know that Mr. S. B. Newcomb, who studied law in the former County, and practised as a barrister at Ingersoll for some years, and who went to Austin, Texas, about twelve months ago, after having been admitted to the Bar of that State, has been recently raised to the Bench of the El Paso District. If the objectionable system of electing Judges by the direct voice of the people was in force there, this would be no compliment, but we understand the appointment is still made on the ground of merit alone. We cut the following from a paper published at Austin:

"Hon. S. B. Newcomb, of Austin, has been appointed Judge of the Twenty-fifth Judicial District. Mr. Newcomb has taken the degree of barrister-at-law in Canada, where he practised his profession for several years. He is a member of the bar of the State of Ohio, as well as of our own State. We congratulate the El Paso bar on their good fortune. The vacancy made by the sudden and cruel death of Judge Clarke, has been filled satisfactorily and ably by the appointment of a gentleman of energy, firmness and courage, of advanced political views, and a mind trained to legal pursuits by the habits of years. We understand that this appointment passed the Senate almost without opposition."

ACTS OF LAST SESSION.

The Bills that were passed during the last Session of the Ontario Legislature received the Royal assent on the 15th February last. The following are those of general interest to the professional reader with their numbers as they appear in the list published in the *Gazette*:—

8. *An Act to make valid certain Commissions for taking affidavits issued by the Court of Queen's Bench.*

This Act refers to some invalid commissions issued under an Act of Upper Canada in the second year of George IV., without the seal of the Court.

11. *An Act to alter the names of the Superior Courts in Ontario.*

This Act we publish in this number.

14. *An Act to confirm the deed for the distribution and settlement of the estate of the Honourable George Jervis Goodhue, deceased.*

We have incidentally referred to this, and to the Spragge Will Act, and to the Caverno Act, as measures of a most objectionable nature, and may refer to the subject hereafter at greater length. One result of these Acts will be seen by looking at Act No. 95 *infra*.

17. *An Act respecting Affidavits, Declarations and Affirmations, made out of the Province for use therein.*

We publish this in another page of this number.

27. *An Act to empower the trustees under the will of the late Joseph Bitterman Spragge to sell certain lands in the township of Blenheim and County of Oxford.*

We have referred to this under No. 14.

33. *An Act respecting Commissioners of Police.*

The purport of this Act appears in the preamble, which recites that by 81 Vic., cap. 78rd, the Governor-General in Council is authorized to appoint one or more fit and proper persons to be and act as a Commissioner or Commissioners of Police within one or more of the Provinces of Canada; and it is desirable and expedient the better to enable such Commissioner or Commissioners of Police so appointed to execute the Criminal Laws of the Dominion, that they should have proper criminal jurisdiction granted to them within this Province, &c.

ACTS OF LAST SESSION.

48. *An Act to amend Chapter Eighty Five of the Consolidated Statutes for Upper Canada intituled, "An Act respecting the conveyance of Real Estate by Married Women," and the Act passed in the thirty second year of the reign of Her Majesty, chapter nine, intituled, "An Act to amend the Registry Act, and to further provide as to the certificates of married women, touching their consent as to the execution of deeds of conveyance.*

This Act will be found on another page.

50. *An Act to make the Benchers of the Law Society of Ontario elective by the Bar thereof.*

We have referred to this Act on several occasions, and our readers are doubtless familiar with its provisions (*ante* pp. 3, 32). All members of the Bar who are not in default as to their Bar fees are eligible. The list is to be prepared by the Secretary on or before the 15th March, and the same is to be subject to inspection, correction and revision until the 1st April. The first election is to be on Thursday, the 6th April. The mode of voting, as provided by the Act, is set out on page 32 *ante*. The voting list required by the Act is as follows:—

LAW SOCIETY ELECTION, 18 .

I, ———, of the ———, in the county of ———, Barrister-at-Law, do hereby declare—

1. That the signature affixed hereto is my proper handwriting.

2. That I vote for the following persons as benchers of the Law Society:—

A. B., of the ———, in the county of ———

C. D., of the ———, in the county of ———, &c.

3. That I have signed no other voting paper at this election.

4. That this voting paper was executed on the day of the date thereof.

Witness, my hand, this ——— day of ———, A. D. 18 .

51. *An Act to amend the Act to regulate the procedure of the Superior Courts of Common Law, and of the County Courts.*

This Act, as amended in special Committee, was published in full in our last issue (page 33). The only alterations made since then are:—Section 3, in the fourth line from end, strike out "entered" and insert "entitled in such last mentioned Court." In 9th Section, fifth line, insert after "suit," "tendering themselves as witnesses," and in the next line after "necessary" insert "or he may instead

require the party intending to give evidence for himself to be examined before his other witnesses." In 11th Section, sixth line from end, strike out "on any" and insert "any telegraph or," and in the next line after "office" insert "belonging to any such corporation and any such master, operator, or express agent." The following new sections have been added:—

Sec. 15. The several County Courts of this Province shall hold four terms in each year, to commence respectively on the first Mondays in the months of January, April, July and October in each year, and end on Saturday, of the same week; Provided always, it shall not be necessary for the Sheriff or his officers to attend the sittings of said Court in Term.

Sec. 16. The sittings of the said County Courts, for the trial of issues of fact and assessment of damages, shall be held semi-annually, to commence on the second Tuesday in the months of June and December in each year, except the County Court of the County of York, which last mentioned Court shall hold three such sittings in each year, to commence respectively on the second Tuesday in the months of March, June and December in each year.

Sec. 17. Sections two and three of the "Law Reform Act of 1868," are hereby repealed.

Sec. 18. Section seven of the "Law Reform Act of 1868," is hereby amended by substituting the word "June" for "July," in the tenth line of the said section seven.

Practitioners are warned that two days longer is required for services of papers when they are to be served on the Toronto agent of a country attorney. Readers would do well to note on their sheet almanacs the alterations made by the Act.

71. *An Act to enable Sullivan Caverno to convey certain Lands in the County of Welland.*

This we have referred to under number 14.

78. *An Act to amend the Assessment Law.*

We shall publish this in the next number of the *Local Courts' Gazette*.

80. *An Act respecting the establishment of Registry Offices in Ridings, and to amend the Registration of Titles (Ontario) Act.*

This Act was spoken of in our January issue (page 7). It gives power to the Lieutenant-Governor in Council to establish a Registry Office in such city, junior county or riding, as he shall deem advisable, and he may order

ACTS OF LAST SESSION.

the removal of any Registry Office from one place in a county to another. We trust these powers will be very sparingly exercised, and that the safety of titles and the convenience of the bulk of the profession will not be made subservient to the exigencies of party politics. Section 50 of 81 Vic., cap. 20, is amended so as to read as follows :

"Every notarial copy of any instrument executed in Quebec, the original of which is filed in any notarial office according to the law of Quebec, and which cannot therefore be produced in Ontario and every prothonotarial copy of any instrument executed in Quebec shall be received in lieu of and as *prima facie* evidence of the original instrument, and may be registered and treated under the Act for all purpose as if it were in fact the original instrument, and such notarial or prothonotarial copy shall be registered without any other or further proof of the execution of the same, or of the original thereof, with the seal of the notary or prothonotary attached."

82. *An Act* to amend an Act respecting the Courts of Error and Appeal, and to amend the Act intitled "An Act for quieting titles to Real Estate in Upper Canada.

This is a short but useful Act, which we publish in full elsewhere.

83. *An Act* to amend Chapter 52, 29 & 30 Vic., and Chapter 30, 31 Vic., relating to Municipal Institutions.

We shall publish this in the next issue of the *Local Courts' Gazette*.

90. *An Act* respecting the Court of Chancery.

This will be found in full on another page of this number.

Thomas Wardlaw Taylor, Esq., heretofore the Judge's Secretary, has been appointed "Referee in Chambers." We shall have occasion to speak of this Act and matters connected with it hereafter. When the item of \$2,000 as salary to the Referee came up in the estimates, Mr. Blake moved in amendment "that the chief duties which may be performed by the Referee in Chambers are such as have heretofore been performed by, and form a part of the work of the Judges of the Court in Chancery; that the salaries of the Judges ought to be paid by Canada and not by Ontario; that Ontario has already burdened itself with the payment of \$10,000 a year for additional remuneration of Judges

of the Superior Courts, and that the said resolution be recommitted with instructions to strike out the provision whereby the further sum of \$2,000 a year is made payable by Ontario for the salary of the Referee." On a party vote this amendment was lost and the item concurred in. The judges have promulgated some new orders with reference to this Act.

95. *An Act* to provide for the appointment of Judicial Officers to whom Estate Bills may be referred.

This is a very short Act contained in one clause, and provides that "the Lieutenant-Governor in Council may from time to time issue commissions to the Judges of the Superior Courts of Law and Equity, empowering them, or any two of them, to report, under the rules and orders of the Legislative Assembly, to the Assembly in respect to any estate bills, or petitions for estate bills, which may be submitted to the Assembly." The rules and orders referred to in this Act are as follows.

"From and after the appointment of Commissioners for the purpose, every Estate Bill, when read a first time, shall, without special reference, stand referred to the said Commissioners, for their Report, and a copy of such Bill, and of the petition on which the same is founded (to be furnished by the petitioner), shall be forthwith transmitted by the Clerk of Private Bills to the said Commissioners, or one of them, in order that they, or any two of them, may, after perusing the Bill, without requiring any proof of the allegations thereof, report to the House their opinion thereon, under their hands; and whether, presuming the allegations contained in the preamble to be proved to the satisfaction of the House, it is reasonable that such Bill do pass into a law, and whether the provisions thereof are proper for carrying its purposes into effect; and what alterations or amendments, if any, are necessary in the same; and, in the event of their approving the said Bill, they are to sign the same; and the said Report, with the said Bill and Petition, are to be transmitted by the said Commissioners to the Clerk of Private Bills; and the same are to be submitted to the Standing Committee on Private Bills, which is not to consider the said Bill before the delivery of the said Report, Bill and Petition, to the Chairman of the said Committee."

98. *An Act* relating to Unpatented Lands sold for taxes.

 ACES OF LAST SESSION.

This will be published in the *Local Courts' Gazette*.

99. *An Act to amend the Act chaptered 20 of 31 Vic., intituled, an Act respecting Registrars' Offices, and the Registration of Instruments relating to Lands in Ontario.*

By this Act, every Deed executed prior to the passing of 31 Vic., cap. 20, affecting lands situate in more than one county, and of which Deed no memorial has been executed, may be recorded in any one of the counties in which some of the lands are situated, upon proof made in accordance with the said Act, and in the other counties by deposit of a copy of every such deed and proof certified as is provided with respect to powers of attorney in section 47 of the said Act.

101. *An Act to facilitate the business of the Superior Courts.*

This Act is comprised in one section and provides:—

"That it shall be lawful for the Chief Justice of Appeal, (if he shall find it convenient,) to sit in the Court of Queen's Bench, Chancery or Common Pleas, and for any one of the Judges of the said last mentioned three Courts, (if he shall find it convenient,) to sit in either of the said other Courts, upon the request of the Judges or Judge with or for whom he shall be so requested to sit; and the said Chief Justice or other Judge so requested shall while so sitting have all the powers and authority of a Judge of the Court in which he shall be so sitting."

One hundred and four Acts in all were assented to; a goodly array, certainly, as far as numbers are concerned, but the wisdom of some of them is more than questionable. The following are some of the Acts already referred to, and now published in advance of the volume in the hands of the Queen's Printer:—

An Act to alter the names of the Superior Courts in Ontario.

(Assented to 15th Feb. 1871.)

Whereas it is expedient to alter the names, &c. Therefore Her Majesty, &c., enacts as follows:—

1. The "Court of Queen's Bench for Upper Canada," shall, during the reign of a King be called "His Majesty's Court of King's Bench for Ontario," and during the reign of a Queen "Her Majesty's Court of Queen's Bench for Ontario."

2. "The Court of Common Pleas for Upper Canada," shall be called "The Court of Common Pleas for Ontario."

3. "The Court of Chancery for Upper Canada" shall be called "The Court of Chancery for Ontario."

4. Notwithstanding anything herein contained, no writ, process, or pleading, shall be held void or irregular, merely on account of the use of the old style of any of said Courts, but the same shall be as valid as if the proper style of such Court had been used.

5. The last preceding section of this Act shall be in force until the first day of January, in the year of our Lord one thousand eight hundred and seventy-two, and no longer, and after such time the same effect and no other shall be given to such misnomer as if such section had never been passed.

An Act respecting Affidavits, Declarations, and Affirmations made out of the Province of Ontario for use therein.

(Assented to 15th Feb. 1871.)

Her Majesty, &c., enacts as follows:—

1. [26 V., ch. 41, repealed except as to commissions issued and proceedings thereunder.]

2. [Lieutenant-Governor in Council may appoint commissioners for taking affidavits, etc., without Ontario, to be used in any court here.]

3. The commissioners so to be appointed shall be styled "Commissioners for taking affidavits in and for the Courts in Ontario."

4. Oaths, affidavits, affirmations or declarations administered, sworn, affirmed or made out of the Province of Ontario, before any commissioner authorized by the Lord Chancellor to administer oaths in Chancery in England, or before any notary public certified under his hand and official seal, or before the mayor or chief magistrate of any city, borough or town corporate in Great Britain or Ireland, or in any colony of Her Majesty without Canada, or in any foreign country, and certified under the common seal of such city, borough, or town corporate, or before a judge of any court of supreme jurisdiction in any colony without Canada belonging to the Crown of Great Britain, or any dependency thereof, or Consular Agent of Her Majesty exercising his functions in any foreign place, for the purposes of and in or concerning any cause, matter or thing depending or in any wise concerning any of the proceedings to be had in the said courts, shall be as valid and effectual and shall be of like force and effect to all intents and purposes as if such oath, affidavit, affirmation or declaration had been administered, sworn, affirmed or made in this Province before a commissioner for taking affidavits therein or other competent authority of the like nature.

5. Any document purporting to have affixed, impressed, or subscribed thereon or there to the signature of any such commissioner, or the signature and official seal of any such notary-public, or the seal of the corporation, and the signature of any such mayor or chief magistrate as aforesaid, or the seal and sig-

* ACTS OF LAST SESSION.

nature of any such judge, consul, vice-consul, acting-consul, pro-consul, or consular agent in testimony of any such oath, affidavit, affirmation, or declaration having been administered, sworn, affirmed or made by or before him shall be admitted in evidence without proof of any such signature, or seal and signature, being the signature or the seal and signature of the person whose signature or seal and signature, the same purport to be, or of the official character of such person.

6. Any affidavit, declaration, or affirmation proving the execution of any deed, power of attorney, will or probate, or memorial thereof, or other instrument for the purposes of registration in this province, may be made before a commissioner appointed under this act, or other person authorized hereby to administer or take oaths, affidavits, declarations, and affirmations.

7. No informality in the heading, or other formal requisites to any affidavit, declaration, or affirmation, made or taken before any commissioner, or other person under this act, shall be any objection to its reception in evidence, if the court or judge before whom it is tendered think proper to receive it.

An Act respecting Appeals in certain cases to Courts of Error and Appeal.

(Assented to 15th Feb. 1871.)

Whereas it is expedient, &c.; Con. Stat. U. C. cap. 13 & 29 Vic. cap. 25; Therefore Her Majesty, &c., enacts as follows:—

1. That section twenty-four of said Statute shall be amended by striking out all after the word "appeal" in the fourth line of the said section to the end.

2. Section twenty-eight of the said Statute chaptered thirteen is amended, so as to read as follows: "An Appeal shall lie in all cases in which a Rule Nisi to quash a by-law of a Municipal Corporation in whole or in part has either been discharged or made absolute."

3. Section forty-six of the said Act chaptered twenty-five is hereby amended to read as follows:—

"An appeal shall lie from any order or decision of a judge under this Act to the full court, or to the Court of Error and Appeal, and also from any order or decision of the full court to the said Court of Error and Appeal, as in the case of orders, decrees, rules and judgments in suits.

4. All appeals under sections twenty-two, twenty-three and twenty-four of the said Statute shall be brought to a hearing within one year after the giving of the judgment, decision or rule appealed from, or within such further time as the Court of Error and appeal may allow.

An Act respecting the Court of Chancery.

Assented to 15th Feb., 1871.)

Whereas it is advisable to provide greater facilities for the transaction of business in the Court of Chancery, and to make various other

provisions in respect to the said court: Therefore Her Majesty, &c., enacts as follows:—

1. The Lieutenant-Governor in Council may appoint an officer of the said court, to be called "Referee in Chambers," who shall perform the duties indicated in the next succeeding section of this Act, and to whom, as far as possible, shall be made all references to be conducted in Toronto, under the "Act for Quieting Titles to Real Estate in Upper Canada," and who, for the purpose of expediting business in the Master's office, shall take such references, and none other, as the Master in Ordinary shall certify that he is unable by reason of press of business, or otherwise, presently to proceed with, and who shall in addition perform such other duties of a ministerial nature as the judges of the said court may by any general order assign to him.

2. It shall be lawful for the said court to make and publish general orders for the following purposes:—

(1.) For empowering the said officer to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same as by virtue of any statute or custom, or by the practice of the said court, is now done, transacted or exercised by a judge of the said court sitting in chambers, and as shall be specified in any such order, except in matters relating to granting writs of Habeas Corpus, and adjudicating upon the return thereof, and to appeals and applications in the nature of appeals, and to proceedings under the thirty-third section of chapter twelve of the Consolidated Statutes for Upper Canada, or under sections five to eleven, inclusive, of the Act of the late Province of Canada, passed in the twenty-eighth year of the reign of Her present Majesty, and chaptered seventeen, and to applications for writs for arrest, and to applications for advice under the Trustee Acts, and to matters affecting the custody of children, and to matters under the first section of the Act passed in the twenty-eighth year of the reign of Her Majesty, chaptered seventeen, and to opposed applications for administration orders, and to opposed applications respecting the guardianship of the person or property of children: Provided always, that in case all the judges of the court are absent from the city of Toronto, such referee may adjourn any motion in chambers in respect to any of such excepted matters upon such terms as he may consider proper.

(2.) For conferring upon any of the local masters of the court all or any of the powers which the said court are hereinbefore authorized to confer upon the said referee in chambers, and to make such regulations as to filing and keeping records, and the transmission of the same, or copies thereof, to an officer of the court at Toronto, as to such court shall seem expedient.

3. Every order or decision made or given

ACTS OF LAST SESSION.

under this Act by the said referee in chambers, or a local master, shall be as valid and binding on all parties concerned as if the same had been made or given by a judge sitting at chambers; Provided always, that it shall be lawful for any person affected by any order or decision of such officer, to appeal therefrom to a judge in chambers, within such time and in such manner as shall be appointed by any general orders to be made in that behalf.

4. The said Referee in Chambers shall not, nor shall the accountant of the said court, nor any clerk appointed under section sixteen of chapter twelve of the Consolidated Statutes for Upper Canada, take for his own benefit, directly or indirectly, any fee or emolument, save the salary to which he may be entitled by law; and all the fees received by or on account of such offices shall form part of the Consolidated Revenue Fund of this Province.

5. There shall be paid out of the Consolidated Revenue Fund of this Province the yearly sums following, as and for the salaries of the Master in Ordinary of the said court and of the said Referee in Chambers, that is to say: To the Master, three thousand dollars (in lieu of all sums heretofore directed to be paid); and to the said Referee in Chambers, two thousand dollars, free from all taxes and deductions whatever, and so in proportion for any broken period.

6. Any clerk of the Master in Ordinary shall, for the purposes of any proceedings directed by the court or the Master to be taken before him, have full power to administer oaths, to take affidavits, to receive affirmations, and to examine parties and witnesses, as the court or Master shall direct; and the said Referee in Chambers shall have like authority in all matters before him.

7. On the first day of March, 1871, all mortgages, stocks, funds, annuities and securities whatsoever, which shall then be standing in the name of the Registrar of the Court of Chancery, or shall be in the custody or power of said Registrar, as such Registrar, and in respect to his office, together with all the interest and estate of the said Registrar in the lands and premises embraced in such mortgages or other securities, shall become by force of this Act vested in the Accountant of the said court for the time being, as such Accountant, subject to the same trusts as they shall then respectively be subject to, and shall and may be proceeded on, by and in the name of the said Accountant, in right of his office, by any action or suit at law or in equity, or in any other manner, or may be assigned, transferred or discharged, as the same might have been proceeded on, assigned, transferred or discharged by or in the name of the said Registrar; and all such funds, stocks, securities and moneys as shall, on the said first day of March, be standing in the name of the said Registrar, as such Registrar, in the books of any bank or other body, politic or corpo-

rate, or company, shall on the said first day of March be carried by the proper officers to the credit of the said Accountant, in the books of the said bank or other body, politic or corporate, or company, in trust to attend the orders of the said court.

8. In all cases in which any interest in real or personal estate, effects or property, shall be vested in the Accountant for the time being of the Court of Chancery, as such Accountant and in respect of his office, all such real and personal estate, effects and property whatsoever, upon the death, resignation or removal from office of each and every Accountant of the said court from time to time, and as often as the case shall happen, and the appointment of a successor shall take place, shall, subject to the same trusts as the same were respectively subject to, vest in the succeeding Accountant by force of this Act; and shall and may be proceeded on by any action or suit at law or in equity, or in any other manner, or may be assigned, transferred or discharged in the name of such succeeding Accountant, as the same might have been proceeded on, assigned, transferred or discharged by or in the name or names of such Accountant so resigning, removed or dying, his heirs, executors or administrators.

9. And whereas doubts have been raised respecting the validity of certain proceedings in the said Court of Chancery, and it is advisable to remove the same, be it therefore enacted that all orders heretofore made, and proceedings had and taken in Chancery Chambers since the tenth day of September, one thousand eight hundred and sixty-six, shall be and the same are hereby declared to be as valid and effectual as if the same had been made, had or taken by a Judge of the said court, although there may have been no Judge actually sitting in chambers when the said orders were made or the said proceedings were had.

An Act to amend Chapter Eighty-five of the Consolidated Statutes for Upper Canada and the Act passed in the thirty-second year of the reign of Her Majesty, chaptered nine.

(Assented to 15th Feb. 1871.)

Whereas it is expedient to facilitate the taking the necessary examination of a married woman, as by law required, on executing a deed of lands and the granting the necessary certificate thereon: Therefore Her Majesty, &c., enacts as follows:—

1. Sections two, three and four of chapter eighty-five, of the Consolidated Statutes for Upper Canada, are hereby repealed, and sections two, three and four of this Act are inserted in lieu thereof.

2. In case such married woman executes such deed in the Province of Ontario, she shall execute the same in the presence of a Judge of one of the Courts of Queen's Bench, Common Pleas, or the Court of Chancery or of the Judge, Junior or Deputy Judge of the County

ACTS OF LAST SESSION—FUSION OF LAW AND EQUITY.

Court, or of a Notary Public for the Province of Ontario, or two Justices of the Peace for the county in which such married woman happens to be when the deed is executed, and any such Judge, Notary Public, or two Justices of the Peace shall examine such married woman apart from her husband, respecting her free and voluntary consent to convey her real estate as expressed in the deed, and if she gives her consent, such Judge or Justices, or Notary Public under his seal of office, shall on the day of execution by her of such deed certify on the back thereof to the following effect:

"I, (or we inserting the name or names and place of residence, &c.,) do hereby certify that on this — day of — A.D., at — in the County of —, the within deed was duly executed in my (or our) presence by A. B., of — wife of — therein named, and that the said wife (or wives) of the said (insert name of husband or husbands) at the said time and place, being examined by me (or us) apart from her (or their) husband (or husbands), did give her (or their) consent to convey her (or their) estate in the lands mentioned in the said deed, freely and voluntarily, and without coercion or fear of coercion on the part of her (or their) husband (or husbands), or of any other person or persons whomsoever."

3. In case any such married woman executes any such deed in Great Britain or Ireland, or in any colony belonging to the Crown of Great Britain, out of Ontario, she shall do so in the presence of the Chief Justice, or a Judge of the Superior Court, or a Notary Public duly appointed, or of the mayor or chief magistrate of a city, borough or town corporate, or any person authorized by the laws of any such colony for that purpose, who shall examine such married woman apart from her husband, touching her consent in the matter, and certify on the back thereof to the effect, as by the second section of this Act is required.

4. In case any such married woman executes any such deed in any state or country not owing allegiance to the Crown of Great Britain, she shall do so in the presence of the governor or other chief executive officer, or the resident British Consul, or of a Judge of a Court of Record of such state or country, or of a Notary Public duly appointed, or of a mayor or chief magistrate of a city, borough, or town corporate in any such foreign country, who shall examine such married woman apart from her husband, touching her consent in the manner, and certify on the back thereof to the effect, as by the second clause of this Act is required; such certificate to be under the hand and the seal used in the office of the person or court by the person so making such examination; Provided always, that no party to any such deed, or engaged in the preparation thereof, either by himself, his partner or clerk, shall make the examination or grant

the certificate required by any of the foregoing clauses under a penalty of four hundred dollars, to be recovered from him, her or them by any person suing therefor in any court of competent jurisdiction.

5. Sections one and two of the Act passed in the thirty-second year of the reign of Her Majesty, chaptered nine, are amended by expunging from section one the words: "any Judge or Justice of the Peace," and from section two the words "the Judge or Justice of the Peace therein mentioned," and inserting in lieu thereof in each of such sections the words "any of the parties entitled by law to take such examination."

6. The following shall be inserted as clause three of said last mentioned Act, and incorporated therewith: "All certificates of discharge of mortgage and the registering thereof, executed or registered previous to the passing of this Act, according to the terms thereof, shall be as valid and binding as if done since the passing hereof."

FUSION OF LAW AND EQUITY.

On the 18th day of September, 1867, a Royal Commission was issued to the following eminent men, Hugh McCalmont, Baron Cairns, a Judge of the Court of Appeal in Chancery (subsequently Lord Chancellor); Sir William Erle, Knight; Sir James Plaisted Wilde, Knight, Judge of the Court of Probate and Judge Ordinary for Divorce and Matrimonial Causes (now Baron Penzance); Sir William Page Wood, Knight, Vice-Chancellor (raised to the Peerage as Lord Hatherley upon being appointed Lord Chancellor in the place of Lord Cairns); Sir Colin Blackburn, Knight, one of the Justices of the Court of Queen's Bench; Sir Montague Edward Smith, Knight, one of the Justices of the Court of Common Pleas; Sir J. Burgess Karlake, Knight, Attorney-General; Sir Roundell Palmer, Knight; William Milbourne James, Esquire, Queen's Counsel, Vice-Chancellor of the County Palatine of Lancaster (subsequently a Vice-Chancellor, and now the Right Hon. Sir William Milbourne James, one of the Lords Justices of Appeal); John Richard Quain, Esquire, Queen's Counsel; Henry Cadogan Rothery, Registrar of the High Court of Admiralty of England; Acton Smee Ayerton, Esquire; George Ward Hunt, Esquire; Hugh Culling Eardley Childers, Esquire; John Hollams, Esquire; Francis Dobson Lowndes, Esquire. By a Royal Warrant, dated 22nd October, 1867, the Right Hon. Sir Robert Joseph Phillimore, Knight, Judge of the High Court

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of Admiralty; Sir George William Wilshere Bramwell, Knight, a Baron of the Court of Exchequer, and William Gandy Bateson, Esq.; and by a further warrant, dated 25th January, 1869, Sir Robert Porrett Collier, Knight, Attorney-General; and Sir John Duke Coleridge, Knight, Solicitor-General, were added to the Commission.

This Commission was appointed to make full enquiry into the operation and effect of the present constitution of the different Courts in England, and of the present separation and division of jurisdiction between the several Courts, as well as the arrangements for holding the Courts, and the distribution and transaction of business in them, with a view to ascertain whether any and what changes and improvements,—either by uniting and consolidating the said Courts or any of them, or by extending or altering the several jurisdictions, or assigning any matters or causes now within their respective cognizance to any other jurisdiction, or by altering the number of Judges in the said Courts, or any of them, or empowering one or more Judges in any of the said Courts to transact any kind of business now transacted by a greater number, or by altering the mode in which the business of the said Courts or any of them, or of the sittings and assizes, is now distributed or conducted, or otherwise,—may be advantageously made so as to provide for the more speedy, economical, and satisfactory dispatch of the judicial business now transacted by the same Courts, and at the sittings and assizes respectively, and further to make enquiry into the laws relating to jurors and trial by jury in general.

Thomas Joseph Bradshaw, Esquire, was appointed Secretary of the Commission.

On the 25th March, 1869, the following Report was presented.*

After reciting the Commission under which they acted the Report proceeds as follows:—

INTRODUCTORY OBSERVATIONS.

In commencing the inquiry which we were directed by your Majesty to make, the first subject that naturally presented itself for consideration was the ancient division of the Courts, into the Courts of Common Law, and the Court of Chancery, founded on the well known distinction in our law between Common Law and Equity.

This distinction led to the establishment of two systems of Judicature, organized in different ways, and administering justice on different and sometimes opposite principles, using different methods of procedure, and applying different remedies. Large classes of rights, altogether ignored by the Courts of Common Law, were protected and enforced by the Court of Chancery, and recourse was had to the same Court for the purpose of obtaining a more adequate protection against the violation of Common Law rights than the Courts of Common Law were competent to afford. The Common Law Courts were confined by their system of procedure in most actions,—not brought for recovering the possession of land,—to giving judgment for debt or damages, a remedy which has been found to be totally insufficient for the adjustment of the complicated disputes of modern society. The procedure at Common Law was founded on the trial by jury, and was framed on the supposition that every issue of fact was capable of being tried in that way; but experience has shown that supposition to be erroneous. A large number of important cases frequently occur in the practice of the Common Law Courts which cannot be conveniently adapted to that mode of trial; and ultimately those cases either find their way into the Court of Chancery, or the suitors in the Courts of Common Law are obliged to have recourse to private arbitration in order to supply the defects of their inadequate procedure.

The evils of this double system of Judicature, and the confusion and conflict of jurisdiction to which it has led, have been long known and acknowledged.

The subject engaged the attention of the Commissioners appointed in 1851 to inquire into the constitution of the Court of Chancery. Those learned Commissioners, after pointing out some of the defects in the administration of justice arising out of the conflicting systems of procedure and modes of redress adopted by the Courts of Common Law and Equity respectively, state their opinion, that “a practical and effectual remedy for many of the evils in question may be found in such a transfer or blending of jurisdiction, coupled with such other practical amendments, as will render each Court competent to administer complete justice in the cases which fall under its cognizance.”

In like manner the Commissioners appointed in 1850 to inquire into the constitution of the Common Law Courts make, in their second report, a very similar recommendation. They report that “it appeared to them that the Courts of Common Law, to be able satisfactorily to administer justice, ought to possess in all matters within their jurisdiction the power to give all the redress necessary to protect and vindicate Common Law rights, and to prevent wrongs, whether existing or likely to happen unless prevented;” and further that “a consolidation of all the ele-

* We are indebted to Mr. Snelling for a copy of this report.

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ments of a complete remedy in the same Court was obviously desirable, not to say imperatively necessary, to the establishment of a consistent and rational system of procedure."

In consequence of these Reports several Acts of Parliament have been passed for the purpose of carrying out to a limited extent the recommendations of the Commissioners.

By virtue of these Acts the Court of Chancery is now, not only empowered, but bound to decide for itself all questions of Common Law without having recourse, as formerly, to the aid of a Common Law Court, whether such questions arise incidentally in the course of the suit, or constitute the foundation of a suit, in which a more effectual remedy is sought for the violation of a common law right, or a better protection against its violation than can be had at Common Law. The Court is further empowered to take evidence orally in open Court, and in certain cases to award damages for breaches of contract or wrongs as at Common Law; and Trial by Jury—the great distinctive feature of the Common Law,—has recently, for the first time, been introduced into the Court of Chancery.

On the other hand, the Courts of Common Law are now authorised to compel discovery in all cases, in which a Court of Equity would have enforced it in a suit instituted for the purpose. A limited power has been conferred on Courts of Common Law to grant injunctions, and to allow equitable defences to be pleaded, and in certain cases to grant relief from forfeitures. These changes, however, fall far short of the recommendations of the Common Law Commissioners, who in their final report expressed the opinion, that power should be conferred on the Common Law Courts "to give, in respect of rights there recognised, all the protection and redress which at present can be obtained in any jurisdiction."

The alterations, to which we have referred, have no doubt introduced considerable improvements into the procedure both of the Common Law and Equity Courts; but, after a careful consideration of the subject, and judging now with the advantage of many years experience of the practical working of the systems actually in force, we are of opinion that "the transfer or blending of jurisdiction" attempted to be carried out by recent Acts of Parliament, even if it had been adopted to the full extent recommended by the Commissioners, is not a sufficient or adequate remedy for the evils complained of, and would at best have mitigated, but not removed the most prominent of those evils.

The authority now possessed by the Court of Chancery to decide for itself all questions of Common Law has no doubt worked beneficially. But the mode of taking evidence orally before an examiner, instead of before the Judge who has to decide the case, has justly caused much dissatisfaction; and Trial by Jury—whether from the reluctance of the

Judge or of the Counsel to adopt such an innovation, or from the complexity of the issues generally involved in the suit, or because the proceedings in Chancery do not give rise to so many conflicts of evidence as proceedings in other Courts,—has been attempted in comparatively few cases.

In the Common Law Courts the power to compel discovery has been extensively used, and has proved most salutary; but the jurisdiction conferred on those Courts to grant injunctions and to allow equitable defences to be pleaded has been so limited and restricted,—the former extending only to cases where there has been an actual violation of the right, and the latter being confined to those equitable defences where the Court of Chancery would have granted a perpetual and unconditional injunction,—that these remedies have not been of much practical use at Common Law, and suitors have consequently been obliged to resort to the Court of Chancery, as before, for the purpose of obtaining a complete remedy.

Much therefore of the old mischief still remains, notwithstanding the changes which have been introduced; and the Court of Chancery necessarily continues to exercise the jurisdiction of restraining actions at law on equitable grounds, and even claims to exercise that jurisdiction in cases where an equitable defence might be properly pleaded at Common Law.

It may be further observed, in illustration of the evils of the double procedure, that whenever a new class of business arises, such as the litigation arising out of railway and other joint stock companies, proceedings, frequently of an experimental character, are commenced both at Law and in Equity by different suitors, leading to the inconvenience of protracted litigation, and the danger of conflicting judgments. We may refer to the litigation lately pending between the sellers of railway shares and the jobbers on the Stock Exchange, by which the sellers sought to obtain an indemnity from the jobbers against calls. The litigation began in a Court of Common Law. A suit in Equity soon followed, by a different plaintiff against the same defendants, both suits asking for a similar redress. The Court of Common Law decided in favour of the plaintiff. The Court of Equity shortly after delivered judgment to the same effect. The defendants appealed in both suits; in the one case to the Exchequer Chamber, in the other to the Court of Appeal in Chancery. Both appeals were pending at the same time, but there was no official machinery by which the Judges of Appeal in Chancery and the Court of Exchequer Chamber could enter into communication with the view of arriving at a common result. The Court of Exchequer Chamber reversed the judgment of the Court below; the Court of Appeal in Chancery, acting independently of the Court of Exchequer Chamber, arrived at

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the same conclusion, and about the same time delivered its judgment, reversing the decision of the Vice-Chancellor. The defendants were thus subjected to litigation (at the instance, no doubt, of different parties), carried on at the same time in different courts, and exposed to the risk of conflicting decisions, those courts operating under different forms of procedure, and being controlled by different Courts of Appeal.

The litigation arising out of joint stock companies has constituted a very large proportion of the business which has engaged the attention of courts of law and equity for some years. Directors of joint stock companies fill the double character of agents and trustees for the companies and shareholders; and the effect of their acts and representations has frequently been brought into question in both jurisdictions, and sometimes with opposite results. The expense thus needlessly incurred has been so great, and the perplexity thereby occasioned in the conduct of business so considerable, as to convince most persons, who have followed the development of this branch of the law, of the necessity that exists for a tribunal invested with full power of dealing with all the complicated rights and obligations springing out of such transactions, and of administering complete and appropriate relief, no matter whether the rights and obligations involved are what are called legal or equitable.

We may refer also to the present condition of the High Court of Admiralty. A conflict, bearing some analogy to that which has so long existed between the Court of Chancery and the Courts of Common Law, seems likely to arise, if it has not already arisen, between the latter Courts and the Court of Admiralty. From ancient times the Courts of Common Law exercised a jealous supervision over the jurisdiction of the Court of Admiralty, and by the issuing of frequent writs of prohibition took pains to confine the jurisdiction of that Court within the narrowest limits. The consequence was, that, except in time of war, when it sat as a Prize Court, there was very little business in the Court of Admiralty until its jurisdiction was extended by recent legislation. Now, however, by virtue of several Acts of Parliament, the first of which was passed so lately as 1840, but more especially by the Admiralty Court Act, 1861, the jurisdiction of the Court has been extended to a variety of cases, which had been theretofore considered as exclusively cognizable in Courts of Common Law. As the Court of Chancery, chiefly by means of its power of granting injunctions for threatened as well as actual injuries, has extended its jurisdiction over a large class of cases properly cognizable in Courts of Common Law, the Court of Admiralty, assisted by the recent legislation above mentioned, and enjoying the peculiar advantage of a Court enforcing the law of maritime lien by proceedings *in rem*, might be expected,

if this system were continued, to extend its jurisdiction over many kinds of litigation relating to ships or cargoes, in respect of which the Courts of Common Law have a concurrent jurisdiction, but are not able to afford such convenient redress. The cause of this is manifestly the imperfection of the Common Law system, and the consequent necessity of seeking for a more complete remedy elsewhere.

Not only are the procedure of and the remedies administered by the Courts of Common Law and the Court of Admiralty different, but sometimes the redress to be obtained is regulated by different and conflicting principles. Thus in a collision suit the damages are, in some cases, assessed on one principle in a Court of Common Law, and on an entirely different principle in the Court of Admiralty. At Common Law, if both parties are found to be in fault, the plaintiff fails. In the Court of Admiralty, the plaintiff, under exactly similar circumstances, is entitled to recover half his damages from the defendant; and there being generally in such cases a cross suit, the defendant is also entitled to recover half his damages from the plaintiff. This anomaly, if our recommendations are adopted, will require to be corrected by legislation.

The Court of Admiralty, even with the extended jurisdiction conferred on it by recent enactments, still labours under the same defect as the other courts. It cannot, in many cases, give a complete remedy; the suitor may obtain one portion of his redress in the Court of Admiralty, but he must go into a Court of Common Law, or it may be into the Court of Chancery, for the rest. The Court of Admiralty has jurisdiction over a claim for damage to cargo, where the owner is not domiciled in England, but it has no jurisdiction over the claim of the shipowner for the freight due in respect of the same cargo; the shipowner must proceed for that in a Court of Common Law. It seems plain that these are counter claims, which ought to be capable of being set off against each other in the same suit. In the same way, the jurisdiction of the Court of Admiralty over claims for necessities supplied to a ship is restricted to the case of a foreign ship, and to that of a British ship where there is not any owner domiciled in England; but if it happens that for some other cause the ship is under arrest, or that the proceeds thereof are in Court, then the Court exercises jurisdiction over all claims for building, equipping, or repairing the ship. All these claims may at the same time be litigated by a different procedure in a Court of Common Law; and hence it may happen not unfrequently that litigation may be proceeding simultaneously in the Court of Admiralty and at Common Law for the adjustment of disputes arising out of the same transaction, between the same parties or those who are liable to indemnify them. The conflict of judicial decisions, which may be thus occasioned, is

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made more perplexing, by the want of a Common Court of Appeal, as the appeal from the Court of Admiralty is to the Privy Council, and from the Common Law Courts to the Exchequer Chamber and the House of Lords.

[The state of the English County Courts is then referred to, as exhibiting the strange working of a system of separate jurisdictions even when exercised by the same Court.]

CONSTITUTION OF THE SUPREME COURT.

We are of opinion that the defects above adverted to cannot be completely remedied by any mere transfer or blending of jurisdiction between the Courts as at present constituted; and that the first step towards meeting and surmounting the evils complained of will be the consolidation of all the Superior Courts of Law and Equity, together with the Courts of Probate, Divorce, and Admiralty, into one Court, to be called "Her Majesty's Supreme Court," in which Court shall be vested all the jurisdiction which is now exercisable by each and all the Courts so consolidated.

This consolidation would at once put an end to all conflicts of jurisdiction. No suitor could be defeated because he commenced his suit in the wrong Court, and sending the suitor from equity to law or from law to equity, to begin his suit over again in order to obtain redress, will be no longer possible.

The Supreme Court thus constituted would of course be divided into as many Chambers or Divisions as the nature and extent or the convenient despatch of business might require.

All suits, however, should be instituted in the Supreme Court, and not in any particular Chamber or Division of it; and each Chamber or Division should possess all the jurisdiction of the Supreme Court with respect to the subject-matter of the suit, and with respect to every defence which may be made thereto, whether on legal or equitable grounds, and should be enabled to grant such relief or to apply such remedy or combination of remedies as may be appropriate or necessary in order to do complete justice between the parties in the case before the Court, or, in other words, such remedies as all the present Courts combined have now jurisdiction to administer.

We consider it expedient, with a view to facilitate the transition from the old to the new system, and to make the proposed change at first as little inconvenient as possible, that the Courts of Chancery, Queen's Bench, Common Pleas, and Exchequer should for the present retain their distinctive titles, and should constitute so many Chambers or Divisions of the Supreme Court; and as regards the Courts of Admiralty, Divorce and Probate, we think it would be convenient that those Courts should be consolidated, and form one Chamber or Division of the Supreme Court.

We further recommend that in order to prepare for any changes that may hereafter be

thought expedient in the constitution of these Chambers or Divisions of the Supreme Court, all future judicial and other appointments therein should be made subject to the possibility of such changes.

Between the several Chambers or Divisions of the Supreme Court so constituted, it would be necessary to make such a classification of business as might seem desirable with reference to the nature of the suits and the relief to be sought or administered therein, and the ordinary distribution of business among the different Chambers or Divisions should be regulated according to such classification. For the same reason which induces us to recommend the retention for the present of the distinctive titles of the different Courts in their new character, as so many divisions of the Supreme Court, we think that such classification should in the first instance be made on the principle of assigning as nearly as practicable to those Chambers or Divisions such suits as would now be commenced in the respective Courts as at present constituted; with power, however, to the Supreme Court to vary or alter this classification in such manner as may from time to time be deemed expedient.

It should further be competent for any Chamber or Division of the Supreme Court to order a suit to be transferred at any stage of its progress to any other Chamber or Division of the Court, if it appears that justice can thereby be more conveniently done in the suit; but except for the purpose of obtaining such transfer, it should not be competent for any party to object to the prosecution of any suit in the particular Chamber or Division in which it is being prosecuted, on the ground that it ought to have been brought or prosecuted in some other Chamber or Division of the Court. When such transfer has been made, the Chamber or Division, to which the suit has been so transferred, will take up the suit at the stage to which it had advanced in the first Chamber, and proceed thenceforward to dispose of it in the same manner as if it had been originally commenced in the Chamber or Division to which it was transferred.

From the consolidation of all the present Superior Courts into one Supreme Court, it follows, that all the Judges of those Courts will become Judges of the Supreme Court; and thus every Judge (with the exception of those who are to sit exclusively in the Appellate Court hereinafter recommended), though belonging to a particular Division, will be competent to sit in any other Division of the Court, whenever it may be found convenient for the administration of justice.

Here arises an important and difficult question, as to the number of Judges who should ordinarily sit in each Chamber or Division of the Supreme Court. Hitherto the constitution of the Court of Chancery and of the Courts of Common Law, in this respect, has been entirely different. Each division of the Court

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of Chancery is presided over by a single Judge, who adjudicates on all matters as a Court of first instance, except in the few cases when he sits as a Court of Appeal from the County Courts. In like manner, a single Judge administers justice in the Courts of Probate, Divorce and Admiralty, respectively. On the other hand, in the sittings of the Courts of Common Law in banc, the Court is ordinarily constituted of four Judges. The matters adjudicated upon by the single Judge in the Court of Chancery are in many instances as important as the business transacted before the four Judges in the Courts of Common Law; so that there would seem to be either a want of power in the Court of Chancery, or an excess of power in the Courts of Common Law; but it must be borne in mind that a considerable proportion of the business of the Courts of Common Law is transacted by one of the Judges sitting at Chambers; much of the business of these Courts also consists of the review of trials which have taken place before a Judge and jury; they also review the decisions of the Judge sitting at Chambers; they are also empowered to decide various important matters, some of which involve questions of general public interest, on which their determination is in some cases final.

With a Court of Appeal such as we propose to recommend, common to all the divisions of the Supreme Court, constantly sitting, and easy of access, we think that matters of great importance may properly, as now in the Court of Chancery, be intrusted to the jurisdiction in the first instance of a single Judge; but, having regard to the principles which have guided us in our previous recommendations, and to the importance of avoiding any too violent transition from the modes of conducting judicial business to which the public have been accustomed, and in which they may be presumed to place confidence, we think it will be advisable to authorise a single Judge to exercise the jurisdiction of the Supreme Court in the despatch of all such business appropriated to the divisions of the Queen's Bench, Common Pleas and Exchequer, respectively, as by general orders, or by the special order of the Court, or the consent of the parties, may be remitted to him; and that all matters now disposed of in banco in those Courts shall be heard and determined by not more than three Judges. We also think that the Judges of each Division or Chamber in which there are several Judges should have power to sit in banco in two sub-divisions at the same time, with the assistance, whenever necessary, of a Judge or Judges from any other Division of the Court.

PROCEDURE IN THE SUPREME COURT.

The next question that arises for consideration is that of the procedure to be adopted in the Supreme Court as above constituted. We can only give a sketch in this report of the

leading principles of the system which we recommend, leaving for general orders, or for a code of procedure, as may appear most advisable, the fuller development and completion of the scheme proposed.

The present modes of procedure in the Court of Chancery, the Courts of Common Law, the Court of Admiralty, and the Courts of Probate and Divorce, are in many respects different; the forms of pleading are different, the modes of trial and of taking evidence are different, the nomenclature is different, the same instrument being called by a different name in different Courts; almost every step in the cause is different. Each Court is confined to its own forms of procedure. Nor is this difference due entirely to the different nature of the cases which the Courts are called upon to try; for often the same question has to be tried, and the same remedy sought, by a totally different method, according as the proceeding is in the Court of Chancery, the Courts of Common Law, or the Court of Admiralty. This variety in procedure was originally due to causes connected with the origin and history of the different jurisdictions, and it has been influenced in more recent times by the almost complete isolation of the several Courts, and by the circumstance that in the Courts of Common Law the ordinary rule and practice is to refer the decision of disputed questions of fact to a jury, without any appeal except by way of reference to a new jury; whilst in the Court of Chancery the Judge ordinarily, in the Courts of Divorce and Probate frequently, and in the Court of Admiralty invariably decides all questions of fact and law, subject to appeal.

We recommend, that as much uniformity should be introduced into the procedure of all the Divisions of the Supreme Court as is consistent with the procedure in each Division appropriate to the nature of the cases, or classes of cases, which will be assigned to each; such uniformity would in our opinion be attended with the greatest advantages, and after a careful consideration of the subject, we see no insuperable difficulty in the way of its accomplishment.

Much may be done at the very commencement of a suit to prevent unnecessary litigation, delay and expense. In a considerable number of suits there is no substantial question as to the right of the plaintiff to at least some relief. Frequently the object of the defendant is to gain time; sometimes he only disputes part of the claim, or of the amount sought to be recovered. In other cases, such as administration suits, suits to take partnership accounts, suits for specific performance, and suits for foreclosure or redemption, it is often from the first known what order must be made upon the hearing of the cause. In many such suits, notwithstanding improvements recently introduced, the proceedings are still conducted as they are in suits involving a real question as to the plaintiff's right to

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relief. Considerable delay is thus caused, and useless costs are incurred.

All suits, we think, should be commenced by a document to be called a Writ of Summons, and these writs of summons should be issued from one office. In all cases in which the plaintiff seeks to recover a money demand, whether founded upon a legal or equitable right, the practice established by the Common Law Procedure Act, 1852, should, we think, be adopted, and the writ should be specially endorsed with the amount sought to be recovered, and in default of appearance the plaintiff should be allowed to sign judgment for it. Further, in all cases in which a special endorsement has been made on a writ, and the defendant has appeared, the plaintiff should be entitled, on affidavit verifying the cause of action, and swearing that in his belief there is no defence, to take out a summons to show cause why he should not be at liberty to sign judgment; upon which summons such order may be made as the justice of the case may require.

In like manner, in cases of ordinary account, as in the case of a partnership or executorship, or ordinary trust account, where nothing more is required in the first instance than an account, the writ should be specially endorsed, and in default of appearance, or after appearance, unless the defendant shall satisfy a Judge that there is really some preliminary question to be tried, an order for the account, with all usual directions, should be forthwith made. The Judge should also be empowered at any time, on summary application in Chambers or elsewhere, to direct, if he think fit, any necessary inquiries or accounts, notwithstanding it may appear that there is some special or further relief sought, or some special matter to be tried, as to which it may be proper that the suit should proceed in the ordinary manner.

PLEADINGS.

When the Defendant enters an appearance, and the suit has to proceed further, the issues between the parties must be ascertained by pleading, or otherwise. The systems of pleading now in use, both at Common Law and in Equity, appear to us to be open to serious objections. Common Law pleadings are apt to be mixed averments of law and fact, varied and multiplied in form, and leading to a great number of useless issues, while the facts which lie behind them are seldom clearly discoverable. Equity pleadings, on the other hand, commonly take the form of a prolix narrative of the facts relied upon by the party, with copies or extracts of deeds, correspondence, and other documents, and other particulars of evidence, set forth at needless length. The best system would be one, which combined with comparative brevity of the simpler forms of Common Law pleading with the principle of stating, intelligibly and not technically, the substance of the facts relied upon as constituting the plaintiff's or the de-

fendant's case, as distinguished from his evidence. It is upon this principle that most modern improvements of pleading have been founded, both in the United States and in our own colonies and Indian possessions, and in the practice recently settled for the Courts of Probate and Divorce.

We recommend that a short statement constructed on this principle, of the facts constituting the plaintiff's cause of complaint, not on oath, to be called the Declaration, should be delivered to the defendant. Thereupon the defendant should deliver to the plaintiff a short statement, not on oath, of the facts constituting the defence, to be called the Answer. When new facts are alleged in the Answer, the plaintiff should be at liberty to reply. The pleadings should not go beyond the Reply, save by special permission of a Judge; but the Judge should, at any stage of the proceedings, permit such amendment in or addition to the pleadings as he may think necessary for determining the real question or controversy between the parties, upon such terms, as to costs and otherwise, as he may think fit.

We think, that a defendant, having a right or claim against a plaintiff with reference to the subject matter of the suit, or arising out of the same transaction, which at present he cannot enforce without a separate or cross action or suit, should be at liberty to bring forward such right or claim by his Answer, which in that case should have the same effect as if it were a Declaration in a cross action or suit, so as to enable the Court or a Judge to pronounce a final judgment between the parties with respect both to the original and to the cross demand. The same principle might, we think, be extended to the recovery of other demands of the defendant, capable of being set off against the plaintiff's demand, when the balance is in favour of the defendant. But a Judge should be empowered, on application by the plaintiff before trial, to refuse permission to allow such cross right or claim to be brought forward, if he shall be of opinion that it cannot conveniently be adjudicated upon in the case to be tried.

We think also, that the Court should have power to direct that any person not originally a party to the suit, but who may have such an interest in the subject matter thereof as to make his presence necessary or expedient to enable the Court to do complete justice, should be summoned to attend the further proceedings, and be bound thereby; and that, with this view, the plaintiff should be at liberty to make any person, against whom he may conceive himself to be entitled to relief, a party defendant to the suit. And, on the other hand, that, where the defendant is or claims to be entitled to contribution or to indemnity or other relief over against any other person or persons, or where from any other cause it shall appear to the Court fit that a question in the suit should be determined, not only as between the plaintiff and defendant, but as

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between the defendant and any other person, the Court should have power to make such order as may be proper for the purpose of having the question so determined.

We think, that either party should be at liberty to apply at any time, either before or after pleading, for such order as he may upon the admitted facts in the case be entitled to, without waiting for the determination of any other questions between the parties.

MODE OF TRIAL.

With regard to the trial and determination of disputed questions of fact, the mode of trial varies according to the court in which the litigation happens to be pending, without any sufficient power of adaptation to the requirements of particular cases.

In the Court of Chancery, until recently, the Judge had no power to summon a jury, whatever might be the conflict of evidence or dispute as to the facts; all questions of fact as well as of law were generally decided by the Judge. In some cases it was the practice to send issues to be tried by a jury at Common Law. This course, however, was taken, not as a mode of trial, but merely for the assistance or information of the Court, which still reserved to itself the ultimate decision of the facts, and if dissatisfied with the first verdict might send the case before a second jury, or decide the facts according to its own view, and without regard to the verdict. Substantially the practice of the Court of Chancery remains unaltered; but there is now a power, which is rarely exercised, of summoning a jury, and the practice of sending issues to be tried at Common Law has become less frequent.

The Court of Admiralty, which decides for itself all questions of law and fact, may in special cases call in the assistance of nautical or mercantile assessors, but it has no power to summon a jury. The Court, however, by a recent statute, has power to direct any question of fact arising in a suit to be tried in a Court of Common Law, and, if it thinks fit, to order a new trial; but the verdict of the jury, when final, is conclusive upon the Court. This power, we understand, has been exercised in only one instance.

[The mode of trial in the Courts of Probate and Divorce is here spoken of.]

In the Courts of Common Law, a jury has always been regarded as the constitutional tribunal for trying issues of fact; and the theory is, that all such questions are fit to be tried in that way. It has, however, long been apparent, in the practice of the Courts of Common Law, that there are several classes of cases litigated in those Courts to which trial by jury is not adapted, and in which the parties are compelled—in many cases after they have incurred all the expenses of a trial—to resort to private arbitration. Until the Common Law Procedure Act of 1854, the parties could not be compelled to go to arbi-

tration, and the power given by that Act is limited to cases where the dispute relates wholly or in part to matters of mere account, or where the parties have themselves before action agreed in writing to refer the matter in difference to arbitration.

The system of arbitration which has thus been introduced, is attended with much inconvenience. The practice is to refer cases which cannot be conveniently tried in court either to a barrister or to an expert. A barrister can seldom give that continuous attention to the case which is essential to its being speedily and satisfactorily disposed of; and an expert, being unacquainted with the law of evidence, and with the rules which govern legal proceedings, allows questions to be introduced which have nothing to do with the matters at issue. In neither case has the referee that authority over the practitioners and the witnesses which is essential to the proper conduct of the proceedings. If the barrister or solicitor who is engaged in the suit, or even a witness, has some other engagement, an adjournment is almost of course. The arbitrator makes his own charges, generally depending on the number and length of the meetings, and the professional fees are regulated accordingly. The result is great and unnecessary delay, and a vast increase of expense to the suitors. The arbitrator thus appointed is the sole judge of law and fact, and there is no appeal from his judgment, however erroneous his view of the law may be, unless perhaps when the error appears on the face of his award. Nor is there any remedy, whatever may be the miscarriage of the arbitrator, unless he fails to decide on all the matters referred to him, or exceeds his jurisdiction, or is guilty of some misconduct in the course of the case.

In the Court of Chancery questions involving complicated inquiries, particularly in matters of account, are always made the subject of reference to a Judge at Chambers. These references are practically conducted before the chief clerk, but any party is entitled, if he thinks fit, to require that any question arising in the course of the proceedings shall be submitted to the Judge himself for decision. In such a case the decision of the Judge is given after he has been sitting in Court all day hearing causes. It has been represented to us that this system does not give satisfaction, and that there is not sufficient judicial power to dispose of the business in Court, and at the same time to give that personal attention to the business in Chambers which was contemplated when references to the Judge in Chambers were substituted for the old references to the Masters in Chancery.

In the Court of Admiralty references are always to the Registrar, assisted if necessary by one or two merchants or other skilled persons as assessors or advisers; the Registrar from his knowledge of law, is enabled to regulate the conduct of the case; the merchants—assuming them to be properly chosen—

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have that practical knowledge which enables them to advise him on questions of a commercial nature that may arise in the course of the proceedings. The reference proceeds like a trial at law until it is concluded, without adjournment, except for special cause, and there is an appeal at once to the Judge in case the Registrar miscarries.

It seems to us that it is the duty of the country to provide tribunals adapted to the trial of all classes of cases, and capable of adjusting the rights of litigant parties in the manner most suitable to the nature of the questions to be tried.

We therefore recommend that great discretion should be given to the Supreme Court, as to the mode of trial, and that any questions to be tried should be capable of being tried in any Division of the Court.

- (1.) By a Judge.
- (2.) By a Jury.
- (3.) By a Referee.

The plaintiff should be at liberty to give notice of trial by any one of these modes which he may prefer, subject to the right of the defendant to move the Judge to appoint any other mode. When the trial is to be by a Jury or by Referee, a Judge, on application by either party, if he think the questions to be tried are not sufficiently ascertained upon the pleadings, should have power to order that issues be prepared by the parties, and if necessary settled by himself. The Judge should also, on the application of either party have power to direct that any question of law should be first argued, that different questions of fact arising in the same suit should be tried by different modes of trial, and that one or more questions of fact should be tried before the others.

The system which, in all the Divisions of the Supreme Court to which it can be conveniently applied, we would suggest for the trial of matters suitable for trial by Referees, is as follows:

OFFICIAL REFEREES.

We think that there should be attached to the Supreme Court officers to be called Official Referees, and that a Judge should have power, at any time after the writ of summons, and with or without pleadings, and generally upon such terms as he may think fit, to order a cause, or any matter arising therein, to be tried by a Referee; and that whenever a cause is to be tried by a Referee, such trial should be by one of these Official Referees, unless a Judge otherwise orders. We think, however, that a Judge should have the power to order such trial to be by some person not an Official Referee of the Court, but who on being so appointed should *pro hac vice* be deemed to be and should act as if he were an Official Referee. The Judge should have power to direct where the trial should take place, and the Referee should be at liberty, subject to any directions which may from time to time be given by the Judge, to adjourn the

trial to any place which he may deem to be more convenient.

The Referee should, unless the Judge otherwise direct, proceed with the trial in open Court, *de die in diem*, with power, however, to adjourn the further hearing for any cause which he may deem sufficient, to be certified under his hand to the Court.

The Referee should be at liberty, by writing under his hand, to reserve, or pending the reference to submit any question for the decision of the Court, or to state any facts specially with power to the Court to draw inferences; and the verdict should in such case be entered as the Court may direct. In all other respects the decision of the Referee should have the same effect as a verdict at Nisi Prius, subject to the power of the Court to require any explanation or reasons from the Referee, and to remit the cause or any part thereof for reconsideration to the same, or any other Referee. The Referee should, subject to the control of the Court, have full discretionary power over the whole or any part of the costs of the proceeding before him.

In connection with the subject of trial, it seems proper to refer to the recommendation of the Patent Law Commissioners in their Report of the 29th of July, 1864, who, after observing, that the present mode of trying the validity of patents is not satisfactory, advise, that such trials should take place before a Judge, sitting with scientific assessors to be selected by himself in each case, but without a jury, unless at the desire of both parties to the suit; and that on such trials the Judge, if sitting without a jury, should decide questions of fact as well as of law. It appears to us that a plan similar in substance to that recommended by the Patent Law Commissioners, might with advantage be applied to the trial, not of patent cases only, but of any cases involving questions of a scientific or technical character, in which the Judge, or the Referee by leave of the Judge, may think it desirable to have the aid, during the whole or any part of the proceedings, of scientific assessors.

EVIDENCE.

As respects the mode of taking evidence at the trial, the practice of the Courts varies considerably. The rule in the Common Law Courts always was and still is that the evidence at the trial should be taken by oral examination of the witnesses in open Court. Formerly, in the Court of Chancery, the witnesses were examined and cross-examined on written interrogatories by an officer of the Court, in the absence of the parties and their legal advisers. At present the evidence in chief is taken, either by affidavit, or orally before an examiner generally in the absence of the opposite party, who has however the power of cross-examination at a later stage, in some cases orally before an examiner, and in others in open Court. In the Court of Admiralty the practice of examining the witnesses in open Court has been recently intro-

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duced, and is now in general use. In the Courts of Probate and Divorce the witnesses are also examined in open Court. There can be no doubt that whenever there is a conflict of evidence the best way of extracting the truth is by oral examination of the witnesses in open Court, in the presence of the Judge or jury who have to decide the case; but there are often formal and collateral matters necessary to be proved in the course of a suit which can be conveniently proved by affidavit, and written evidence may sometimes be combined with oral evidence so as to save expense, and facilitate a speedy trial.

We recommend, for these reasons, that, in the absence of any agreement between the parties, and subject to any general order of the Court applicable to any particular classes of cases, the evidence at the trial should be by oral examination in open Court, but that the Court should have power at any time to direct that the evidence in any case, or as to any particular matter at issue, should be taken by affidavit, or that affidavits of any witnesses may be read at the trial, or that any witnesses may be examined upon interrogatories or otherwise before a commissioner or examiner. Any witness who may have made an affidavit should be liable to cross-examination in open Court, unless the Court or a Judge shall direct the cross-examination to take place in any other manner. Upon interlocutory applications, the evidence should, we think, as a general rule be taken by affidavit, but the Court or a Judge should upon the application of either party have power to order the attendance, for cross-examination or otherwise, of any person who may have made an affidavit.

The existing practice as to requiring admissions of written documents should, in our opinion, be continued. We think, also, that a similar practice might with advantage be extended to the admission of certain facts as well as documents; and therefore we recommend that if it be made to appear to the Judge, at or after the trial of any case, that one of the parties was a reasonable time before the trial required in writing to admit any specific fact, and without reasonable cause refused to do so, the Judge should either disallow to such party or order him to pay (as the case may be) the costs incurred in consequence of such refusal.

INCIDENTAL POWERS.

Some other incidental powers which the Court, in our opinion, ought to possess, may be conveniently mentioned in this place.

The Judge at the trial should, without consent of the parties, have power to reserve leave to the Court to enter a nonsuit or verdict, and when the Judge at the trial has reserved any question of law, he should have power to direct the cause to be set down for argument before the Court, without motion for a rule *nisi*. Upon motion for a new trial the Court should have power, although no

leave has been reserved at the trial, to order a nonsuit or verdict to be entered.

The time within which an application must be made for a new trial should be regulated by general orders of the Supreme Court.

We recommend that every order of a Judge at Chambers or at *Nisi Prius* should have the same force and effect as a rule of Court now has, and that a Judge sitting in Chambers or at *Nisi Prius* should have the same power to enforce, vary, or deal with any such order by attachment or otherwise as is possessed by the Court, but the Court should have power, upon application in a summary way, to enforce, vary, or discharge any such order.

We think that a Judge should have power, at any time after writ issued, upon being satisfied that the plaintiff has a good cause of action or suit, and that the defendant is about to leave, or is keeping out of the jurisdiction in order to avoid process, to order an attachment to issue against any property of the defendant which may be shown to be within the jurisdiction; such property to be released upon bail being given, and in default of bail to be dealt with as a Judge may direct. This power, which is analogous to that now vested in the Court of Admiralty, may make the use of writs of *Capias* and *Ne exeat regno* by the Court of Common Law and Chancery (which are sometimes used oppressively) less frequent. It may also render the retention of the process of foreign attachment in the Lord Mayor's Court in the City of London unnecessary.

COSTS.

In the Court of Chancery, the Court of Admiralty, and the Courts of Probate and Divorce, the Court has at present full power over the costs. We think that the absence of this power in the Courts of Common Law often occasions injustice, and leads to unnecessary litigation. We therefore recommend that in all the Divisions of the Supreme Court the costs of the suit and of all proceedings in it should be in the discretion of the Court.

GENERAL ORDERS.

Power should be vested in the Supreme Court to regulate from time to time by general orders the procedure and practice in all its divisions, and to make such changes in the duties of the several officers of the Court, as may from time to time be thought fit, and may be consistent with the nature of their appointments.

SITTINGS AND ASSIZES.

We now proceed to consider the present general arrangements for the conduct of judicial business.

The sittings during Term are occupied, together with a portion of those after Term, in the Courts of Common Law, by business in banco, *Nisi Prius* sittings going on at the same time. Some descriptions of business in the Courts of Common Law can only be transacted during Term. In all other Courts

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there is practically no difference in the business done at the Sittings during and out of Term.

We think that, unless it should be thought right wholly to abolish the division of the legal year in three Terms, there should be three instead of four Terms, commencing respectively on the 2nd November, 11th January, and 1st May in each year, the duration of each Term to be four weeks.

There may be some convenience in retaining such fixed periods with a view to the necessary times of vacation, which immediately precede the autumnal and winter sittings of the Courts, and which it might be expedient in the spring to regulate, so as to coincide as nearly as possible with the Easter recess of Parliament. But we are of opinion that there should not be in any Division of the Court any distinction between the business capable of being transacted in or out of Term, and that all the Courts should have power to sit any time, in or out of Term, for the despatch of any business.

With respect to the business of the Common Law Courts in banco, it is unnecessary to add anything here to the recommendations in the previous part of our Report. For the despatch of any part of the present Chamber business of the Common Law Courts, as requires to be transacted by a Judge, we think that one Judge at least should sit continuously during the legal year.

[The arrangements for holding sittings for the trial of causes in particular localities in England are discussed next in order, but it is useless to give the remarks at length.]

CIRCUITS.

The arrangements for holding Sittings or Assizes in the other parts of England and Wales have been much considered by the Commission; but we are not prepared, without further deliberation, to submit to Your Majesty a detailed scheme on that subject.

[The Commissioners then indicate briefly the direction of the changes on this subject, which they were disposed to recommend, and some of the principles on which those changes should be founded. The changes alluded to were called for by the necessity for holding assizes in every County without regard to the extent of the business to be transacted, and without regard to the changes made by the lapse of centuries in the population of the various towns and counties. We omit therefore all except the latter part of it.]

We also consider it advisable that all local venues in civil actions should be abolished, leaving it to the Court or Judge to control the choice of the plaintiff in case an inconvenient venue should be chosen.

In order to lighten the business on circuit, we think it expedient that the jurisdiction of Quar-

ter Sessions should be extended to burglary, and some other offences which we do not think it necessary here to define; and that a classification of offences triable at the Assizes and at Quarter Sessions should be made, and that all magistrates be directed to make their commitments in accordance with such classification, unless it appear to the Magistrate, and he state in his warrant of commitment, that the case appears to him to be of such importance as to be fit for trial at the Assizes.

A proviso* similar to that which is now introduced into the Commissions for the Winter Assizes should, in our opinion be invariably inserted in the Commissions of every Assize, limiting the duties of the Judges to the trial of persons committed to the Assizes only.

[The question of juries is then taken up, but this does not touch upon the matter in hand, and is therefore omitted.]

APPEALS.

We now come to the important subject of Appeals. It follows, from the principles of our preceding recommendations, that the system of appeal from all the divisions of the Supreme Court exercising jurisdiction in the first instance ought to be made, as far as possible, simple and uniform.

At present, the appeal for orders or decrees made by the Judges of first instance, in the Court of Chancery, is either to the Court of Appeal in Chancery, or to the House of Lords, at the option of the appellant; there is also an appeal to the House of Lords from the Court of Appeal in Chancery. Appeals and errors from the Courts of Queen's Bench, Common Pleas, and Exchequer must in all cases go to the Court of Exchequer Chamber, from whence a further appeal, or error, as the case may be, lies to the House of Lords. From the Court of Probate appeal also lies to the House of Lords. From the decrees and orders of the Judge Ordinary of the Divorce Court an appeal lies to the full court, consisting of the Judge Ordinary and two Common Law Judges; and also in certain cases from the full court, or from the Judge Ordinary exercising the powers of the full court, to the House of Lords. From the Court of Admiralty, the sole appeal is to your

* Note.—The form of the proviso above referred to is as follows:—

Provided always, and our will and pleasure is, that whenever it shall be made to appear by the warrant of commitment or recognizance to prosecute, or otherwise, that the offence of any person or persons was intended to be inquired into and heard and determined at any sessions of the peace in the county aforesaid, it shall not be necessary for you or said justices hereby assigned, or for any of you, to inquire into or hear or determine such offences; provided also, and our will and pleasure is, that whenever it shall be made to appear by the warrant of commitment or recognizance to prosecute, or otherwise, that any prisoner in our said gaol has been committed thereto in order to his or her being tried at the next sessions of the peace for the said county, you or said justices hereby constituted, or any of you, shall not be required to deliver our said gaol of such prisoner, but shall be at liberty to order such prisoner to remain in our said gaol.

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Majesty in Council, or, practically, to the Judicial Committee of the Privy Council.

Upon the constitution of the House of Lords, considered as a Court of Appeal, we do not consider it to be within the scope of our Commission to offer any other remarks than than that it unavoidably impairs the efficiency of the Court of Chancery during the session of Parliament, by withdrawing the Lord Chancellor for the whole of four days in every week from his own Court. Upon the constitution of the Judicial Committee of the Privy Council we also abstain from saying more, than that it has been, for many years, found impossible to discharge the appellate duties of that body without withdrawing one or more Judges (often the Lord Justices or the Master of the Rolls, sometimes the Judge of Admiralty or Probate, or one of the Chiefs of the Courts of Common Law) from their respective Courts, to the great inconvenience of suitors, and delay of business in those Courts, during the considerable, and continually increasing, periods of time occupied in every year by the transaction of Privy Council business. Any arrangements, therefore, which may tend to relieve the House of Lords, or the Judicial Committee, from any appeals which now go there will so far add to the strength of the Supreme Court.

The Court of Appeal in Chancery, consisting of the Lord Chancellor and the Lords Justices, is in practice generally divided into two Courts, in one of which the Lord Chancellor presides alone, in the other the Lords Justices; and, during the Session of Parliament, the Lord Chancellor's Court is closed, as has been already stated, except for two days in the week. When the Lord Chancellor happens to be less conversant with equity business than the Lords Justices, his decision, sitting alone in appeal from a Court of Equity, cannot be so satisfactory to the suitors, as if he had the benefit of their assistance; and when the Lords Justices, as has sometimes happened, differ in opinion, the appeal to them necessarily fails, the judgment of the Court below is affirmed, and a further appeal to the House of Lords frequently results. Cases of more than usual importance are, indeed, sometimes reserved for hearing, or are directed to be reargued, before the full court of Appeal; but the pressure of business, and the engagements of the Lord Chancellor for so great a portion of the year in the House of Lords, confine within very narrow limits the time which can be allotted to sittings of the full court.

The Court of Exchequer Chamber is formed by a combination of all the Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer, under such arrangements, that errors and appeals for each of those Courts are determined by Judges taken from the other two. The inconveniences of this system are, in practice, very serious. All these Judges having, during nearly the whole year,

pressing demands upon their time for other purposes, are only able to devote a very limited number of days after each term to the hearing of appeals and errors; and each of these periods requires to be broken up into three parts, and the constitution of the Court to be three times changed, in order to dispose of a portion of the appeals and errors from each of the Courts of first instance. The effect generally is so far to reduce the number of Judges, who are able to attend in the Court of Exchequer Chamber, as, in case of any difference of opinion, to render it possible that the majority of opinions, in the Court of Appeal and the Court of first instance taken together, may be overruled by the minority,—a result which, as the Judges of Appeal are not appointed or selected specially to act as such Judges, and the Judges who have been overruled to-day may to-morrow themselves sit in appeal from some decision of the Judges who have taken part in overruling them, is eminently unsatisfactory. The same causes also lead, in many cases, to great and unavoidable delays in the disposal of Common Law errors and appeals.

The constitution of the full court of Divorce, by the addition of two Judges of the Common Law Courts, withdrawn *pro hac vice* from their own duties, and associated with the Judge the Ordinary, is liable to some of the same objections.

The conditions on which appeals or errors can be brought from the different Courts are also widely different.

To the Court of Appeal in Chancery and to the House of Lords from the Court of Chancery, an appeal lies from all orders and decrees, whether interlocutory or final, of the Courts below, and upon all questions, whether of fact or of law; except that the verdict of a jury, or of a Judge exercising the functions of a jury, can only be impugned by a motion for new trial. The jurisdiction of the Court of Appeal in Chancery, or of the Master of the Rolls or a Vice-Chancellor to rehear his own decree, a practice which is also allowed, may be excluded by a formal procedure called enrolment, which takes place at the instance of any party, practically at any time within five years from the date of the decree or order enrolled, if nothing has been done in the meantime by the suitor with a view to bring the matter before the Court of Appeal. After this no error in the decree or order enrolled, except mere clerical mistakes, can be corrected by the Court of first jurisdiction, or by the Court of Appeal in Chancery, without a new suit for that purpose, called a Bill of Review. The same formality, which shuts the door of the Court of Appeal in Chancery, opens to the dissatisfied suitor that of the House of Lords, which does not receive appeals from decrees or orders of the Court until after they have been enrolled. Both the Court of Appeal in Chancery, and the House of Lords, proceed upon the same record and evidence,

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which were before the Court from which the appeal is brought; and the Court of Appeal in Chancery, both in what are technically called rehearings of decrees and decretal orders, and upon appeal petitions or motions, has all the powers possessed by the Court of first instance, and can therefore allow amendments of the record, and in some cases may receive new and further evidence; which is contrary to the practice of the House of Lords.

From the Courts of Common Law to the Exchequer Chamber, error lies in certain cases, and appeal in others. Error is brought, as of right, on matter of law apparent on the record, on judgments on demurrers, on bills of exceptions for the improper reception or rejection of evidence, or for misdirection by the Judge at the trial on special cases, on judgments *non obstante veredicto*, and for arrest of judgment. Appeal lies, as of right, from decisions upon points of law reserved at a trial. It also lies, but not without leave of the Court, unless the Judges differ, on motions for new trial on the ground of improper reception or rejection of evidence, or of misdirection by the Judge. No judgment, rule, or order is appealable which does not fall within one or other of these classes of cases. From all judgments of the Court of Exchequer Chamber, a further appeal or error, as the case may be, lies to the House of Lords.

Among the inconveniences of this system are the following:—Error cannot be brought from any interlocutory judgment, *e. g.*, a judgment allowing a demurrer, before the final determination of all issues of law and of fact joined upon the record. The points of law decided on the demurrer may be sufficient, if the judgment stands, to determine the whole controversy between the parties; yet if, as is commonly the case, issues of fact, as well as law, have been joined in the pleadings, it is necessary to go through the expense and delay of trying all those issues, though according to the judgment on the demurrer they are wholly immaterial, in order to get into the Court of Error. As to bills of exceptions, the rule is that they must be tendered at the time of trial, and before verdict given, excluding all opportunity for deliberate consideration, and giving occasion to difficulties as to the proper mode of stating the terms, or substance and effect of the Judge's ruling; no bill of exceptions being admissible unless signed by the Judge, and no proof of his ruling, extrinsic to the bill of exceptions itself, (*i. e.*, by shorthand note or otherwise,) being allowed. The practice has been to hand in a hasty and imperfect note at the trial, leaving the bill of exceptions itself to be afterwards agreed upon by the parties, or settled by the Judge. In some cases it is found difficult, in others impossible, to come to any agreement or settlement, and, whenever any difference arises, it leads to great delay and expense. The cases are so few in which the points of law really intended to be

raised can be satisfactorily taken by this form of proceeding that it is of little use. The convenient mode, and that generally adopted, of raising those points, except when the parties agreed to have a special case stated, a practice attended with its own inconveniences, is either by reserving them at the trial, which depends on the leave of the Judge, and the consent of the parties, or by motion for a new trial. The power of appeal when the latter mode is adopted, if the Court gives an unanimous judgment, is not of right, but depends upon the will and discretion of the Court.

When appeal is brought, the Court of Exchequer Chamber does not proceed simply upon the materials which were before the Court below, but a case must be made up between the parties, which must be settled by the Judge if the parties differ; and, as such differences often happen, this is apt to lead to considerable expense and delay.

Appeals lie to the House of Lords, as of right, from all final orders or decrees of the Court of Probate, whether depending on questions of law or of fact only, and from all interlocutory decrees or orders of that Court, by the leave of the Court, but not otherwise.

In the Divorce Court, every decision of the Judge Ordinary, whether on law or on fact, is subject to an appeal to the full Court, whose decision is final, except in cases of dissolution of marriage, nullity of marriage, or declaration of legitimacy, in which excepted cases only an appeal lies from sentences and final judgments of the Divorce Court to the House of Lords.

In the Court of Admiralty, as in the Court of Probate, all final sentences are appealable as of right, and all interlocutory judgments are appealable by the leave of the Court only.

The rules as to the time for appealing, in the different Courts, are also different.

For appeals and rehearings in Chancery, a period of five years from the date of the decree or order appealed from is allowed, after which the leave of the Lord Chancellor or Lords Justices is necessary, and such leave may be given at any time, but will only be given if it shall "appear, under the peculiar circumstances of the case, to be just and expedient."

For appeals to the House of Lords from the Court of Chancery, two years from the date of the enrolment of the order appealed from, and thenceforth until the end of a fortnight after the beginning of the next session of Parliament, are allowed; and when a final decree is appealed from, all prior interlocutory orders in the same cause, though enrolled for more than the prescribed period, may be included in the appeal.

At Common Law, six years from the date of final judgment are allowed for bringing error to the Exchequer Chamber, and a like period of six years for bringing error from the Exchequer Chamber to the House of Lords. In cases of appeal, as distinguished from error, in the Common Law Courts, notice

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of appeal must be given within four days after the decision appealed from, unless the time is enlarged. When such notice is given, as for want of the opportunity of full consideration it generally is, no time is limited within which the party must proceed to prosecute his appeal.

In the Probate Court application for leave to appeal from an interlocutory decree or order must be made within a month after the delivery of the decree or order, or within such enlarged time as the Court may direct; and it may be doubtful whether any time is limited for appealing from final decrees or orders.

In the Divorce Court, the appeal from the Judge Ordinary to the full court must be filed within three months from the date of the decree appealed from; and that to the House of Lords, whether from the full court or from the Judge Ordinary, within one month.

Appeals from the Court of Admiralty must be founded either on notice given to the registrar immediately after the delivery of the judgment, or upon a declaration, called a protocol of appeal, made before a notary and witnesses within fifteen days, and must be prosecuted by presenting a petition of appeal to your Majesty in Council within one year from the date of the sentence or decree appealed from.

As to security for the costs of appeal:—

In the Court of Chancery none is required beyond a deposit of 20*l.* with the registrar, when the petition is for rehearing of a decree or decretal order. Upon interlocutory appeals no deposit is made. In the Courts of Common Law, every appellant (in an appeal technically so called) and every defendant in an action who brings error is required to give substantial bail to pay costs; but a plaintiff who is also plaintiff in error gives no security. In the Courts of Probate and Divorce no security for costs is taken, but the general orders of the House of Lords require all appellants to that tribunal to enter into their own recognizances, without sureties, for 400*l.* Appellants from the Court of Admiralty, if resident out of the jurisdiction of the Court, may be required to give bail in 300*l.*; if within the jurisdiction, they give no security.

In the Court of Chancery and the Probate Court an appeal does not operate as a stay of execution unless the Court, upon a special application, so directs. In the Divorce Court it does, practically, so operate. In the Courts of Common Law appeal or error operates always as a stay of execution as soon as security is given. In the Court of Admiralty an appeal is followed, as of course, by an inhibition, which has the same effect.

COURT OF APPEAL.

For these various and discordant systems of appeal we recommend the substitution of the scheme embodied in the following suggestions:

CONSTITUTION OF COURT.

First, we propose that in the place of the Court of Exchequer Chamber, and of the Court of Appeal in Chancery, both of which Courts, as now constituted, would cease to exist, there should be established, as a part of the Supreme Court, a Court of Appeal, consisting of—

The Lord Chancellor,
The Lords Justices,
The Master of the Rolls, and
Three other permanent Judges, with
Three of the Judges of the Supreme Court to be nominated annually by the Crown;

an additional Vice-Chancellor being substituted, as a Judge of First Instance, for the Master of the Rolls. The Court of Appeal thus constituted should be empowered to sit either as a full court, or in divisions, but the number of Judges sitting together in any division ought never to be less than three. The Judges of the Court, other than the nominated Judges, should always form a majority of the Court.

We propose further, that to this Court an appeal should lie from all judgments, decrees, rules, and orders, in suits or proceedings not strictly criminal, of any division or Judge of the Supreme Court, with certain exceptions which we shall afterwards specify. It may hereafter deserve consideration, after experience of the working of the Court thus constituted, whether its decisions may not be made final, unless leave to appeal from them be given, either by the Court itself, or by the House of Lords. In the meantime, we recommend that there should be a right of appeal to the House of Lords.

A direct appeal to the House of Lords, without going through the Court of Appeal, might, we think, be allowed in all cases in which an appeal on matter of law would lie to the Court of Appeal, if the respondent consents to that course being taken, but not otherwise.

The limitations or exceptions to which we think the right of appeal ought to be subject are the following: judgments, decrees, or orders founded upon and applying the verdict of a jury, or the verdict of a Judge discharging the functions of a jury ought not to be appealable, except upon matter of law. Interlocutory orders, if made by any division of the Supreme Court, consisting of three or more Judges, should not be appealable, except in case of difference of opinion among the Judges, or by special leave of the Court; and, if made by any division or judge with respect to any question of procedure or practice, as to which the Court or Judge had power to make the order, should be appealable only under such regulations as may be made by General Orders. As a general rule, no appeal should be allowed as to costs only.

The time of appealing from interlocutory orders made in the progress of a suit, before the final decision upon the merits between the parties, ought to be regulated by general

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orders. In all other cases a fixed period, not exceeding six months from the time when any judgment, decree, rule, or order is made or entered upon the record, should, we think, be allowed for appealing against it. These rules, as to the time for appealing, should apply both to appeals to the Court of Appeal, and to appeals to the House of Lords; and the office of the Clerk of the Parliaments ought to be open for the reception of appeals at all times of the year, whether Parliament be or be not sitting.

All proceedings in error and bills of exceptions should be abolished; and every appeal to the Court of Appeal should be brought by notice of motion by way of appeal, in a summary way, without any petition or formal procedure. No enrolment of any judgment, decree, rule, or order should be necessary in order to enable any party to appeal therefrom to the House of Lords; and every appeal to the House of Lords should be brought by a petition in a short form, stating the title of the cause or matter, with the names of the parties thereto, and the date of the order appealed from, and when the same was made or entered on the record; and also, who are the respondents to the appeal, and whether a general reversal, or a variation in any and what particulars, of the order appealed from is sought, but without setting out at length any of the proceedings.

The right of appeal should, we think, as a general rule, be conditional on substantial security being given by the appellant for the costs of the appeal. Inasmuch, however, as there may be cases to which this rule could not be applied without inconvenience or injustice, we think, that both the nature and the amount of such security, and the regulations according to which it may be required or dispensed with, are subjects which may properly be dealt with by general orders of the Court.

No appeal should operate as a stay of execution, or of proceedings under the order appealed from, unless the Court, or a Judge of the Court, from which the appeal is brought, or the Court of Appeal, shall so order. But such stay of execution should be granted, as of course, when the order under appeal is for a money payment, on the terms of payment of the money into Court, or of security being given to the satisfaction of the Court.

With respect to the hearing of appeals, we would propose that the following rules should be established and made applicable both to the Court of Appeal and to the House of Lords.

Every appeal should be deemed to be in the nature of a rehearing, and the Court of Appeal should have power, if the justice of the case shall appear so to require, to allow any pleading or any special case to be amended, or any supplemental pleading or statement to be added to the record; or, upon any ques-

tion of fact, to admit further evidence. Upon appeals and motions for new trial, proof of a Judge's ruling by a shorthand writer's notes ought, in our opinion, to be received. Upon the hearing of the appeal the Court should have jurisdiction over the whole record, and no interlocutory order, from which there has been no appeal, should operate so as to bar or prejudice a decision upon the merits.

The Court should also have power, upon the hearing of any appeal, to vary or alter the order under appeal in favour of the respondent, in any manner which may appear proper to do complete justice between the parties, as if the respondent had presented a cross appeal, complaining of any part of the order by which he may deem himself to have been aggrieved.

If these recommendations are adopted, we think that there should be no rehearing of any cause or matter before the Court by which it was originally heard, except by leave of the Court, nor, unless by consent of all parties, after the expiration of the time limited for appealing; and that bills of review for error apparent on the record should be abolished. Nothing, however, in these rules should take away or abridge the power of the Court to rectify any error which may have occurred in drawing up any judgment, decree, rule, or order.

We shall proceed, with due diligence, to consider the other matters embraced in Your Majesty's Commission; and we humbly submit to Your Majesty's gracious consideration this our First Report.

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R. P. COLLIER.	(L.S.)
‡ JOHN DUKE COLERIDGE.	(L.S.)
ROUNDELL PALMER.	(L.S.)
JOHN B. KARSLAKE.	(L.S.)
J. R. QUAIN.	(L.S.)
H. C. ROTHERY.	(L.S.)
‡ ACTON S. AYRTON.	(L.S.)
WILLIAM G. BATESON.	(L.S.)
JOHN HOLLAKS.	(L.S.)
FRANCIS D. LOWNDES.	(L.S.)

THOS. BRADSHAW, Secretary,
25th March, 1869.

* Agreeing with the general spirit and with most of the recommendations of the Report, I have subscribed it.

There are two subjects on which I desire to guard the expression of my opinion:

(1.) I think it is not expedient to destroy the special jurisdiction of the High Court

FUSION OF LAW AND EQUITY.

of Admiralty. That Court has always administered in peace and war maritime international law. To no other Court has the Crown ever granted a commission of prize; and even before the issue of such commission, it has, in the opinion of Lord Stowell, an inherent jurisdiction in these matters. I may observe that the forms of pleading now in use in the High Court of Admiralty are as nearly as possible those which this Report recommends to be generally adopted by all Courts.

(2.) I think that the want of power in the Commission to consider the composition of the final Court of Appeal has been unfortunate, because it has practically excluded from our consideration—

(a.) Whether it be expedient that two Final Courts of Appeal, namely, the House of Lords and the Judicial Committee of the Privy Council should still continue:

(b.) Whether, if so, the composition of either or both should remain unaltered.

Yet the consideration of both these questions ought, in my judgment, to have preceded, and would perhaps have considerably modified the suggestions for the intermediate Court of Appeal made in this report. I think it also very doubtful whether that Appellate Court should be composed for the most part of Judges exercising appellate jurisdiction only.

ROBERT J. PHILLIMORE.

† CIRCUITS: I cannot concur in this recommendation to its full extent.

G. BRAMWELL.

† We are not able to concur in the recommendation that several counties should be consolidated for assize purposes to the extent indicated in the Report. Our general view is, either that the present system of holding assizes, which is based on the existing divisions of counties, and which brings justice reasonably near to the homes of suitors, witnesses, and jurymen, should, with some modifications, be retained; or that the present system of circuits should be altogether discontinued, and Provincial Courts established with assigned districts, having Judges who should go frequent circuits to convenient places within such districts; and with appeal from the Provincial Courts in certain cases to the Metropolitan Courts of Appeal.

MONTAGUE SMITH.

JOHN DUKE COLERIDGE.

‡ I desire to record my opinion, that the following questions should be further considered:—

Whether all proceedings should not be commenced and prosecuted in the County Courts, unless it appears from the nature of

the case that it is proper to remove it into the Supreme Court.

Whether it is desirable to allow such facilities for appealing, and repetition of appeals.

Whether, having regard to the unequal means of litigants, the changes proposed might not render it desirable to establish a new system of legal remuneration, and to limit the claims of suitors against each other for costs.

Whether it might not be desirable to substitute for the discretion of the Judges in respect of costs certain rules of positive application.

Whether the qualification of jurymen should not rather be lowered than increased.

Whether sufficient consideration has been given to the other elements in the administration of the law beyond that of excellence of judicial decision, namely, the time of the suit, the expense to the suitor, and the influence of the administration of justice on the social and political condition of the people.

Whether the House of Lords, if it is to continue a Court of Appeal, might not be rendered efficient for the purpose by legal peerages conferred on Judges of a certain standing, so as to make the Bench independent of the pleasure of the Crown, and by constituting a permanent Committee of such peers, on the principle of the Judicial Committee of the Privy Council.

ACTON S. AYTON.

Thus concludes the first Report of the Commissioners. The Bill first founded upon it fell through, but we understand it will, in an altered shape, be again brought before the Houses of Parliament in England.

The subject is one of great interest to the profession in Canada in view of this and of the resolutions recently brought before the Ontario Legislature by Mr. Edward Blake:—

“1. That according to the present plan of dispensing justice in civil cases, there are two different and inconsistent systems of law, one of which is framed chiefly to soften the rigour and supply the defects of the other.

2. That these two systems are administered by different Courts, with different modes of procedure, neither Court being competent to do full justice or administer the whole law of the land in each case before it.

3. That this plan is anomalous in theory, and in practice involves great and needless expense to suitors, causes confusion, embarrassment and uncertainty in the law, and retards its amendment.

4. That under any well regulated plan there should be but one system of law, under which each party to a suit should be able to enforce in that suit against the opposite party his full rights.

5. That in the opinion of this House steps should be taken to obviate the defects indicated,

C. L. Cham.]

BELYEA V. MUIR ET AL

[C. L. Cham.]

and accomplish the result aimed at in the preceding resolutions."

In the discussion arising on these resolutions, the Attorney-General said that a matter of such importance should be carefully considered, and not be adopted in haste (though he quite agreed with the spirit of them); he therefore suggested that a Commission should issue to inquire into the matter, and the resolutions were thereupon withdrawn.

We do not ourselves at present express any opinion on this subject, but we increase the size of our present number, to give our readers the benefit of the labours of the eminent men who have in England considered to a certain extent at least the bearings of this most important subject.

Whatever be done let there be none of that haste which characterised too much of the legislation of last Session affecting law bills.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law.)

BELYEA AND WIFE V. MUIR ET AL.

Equitable plea.

Part of the land included in a conveyance was inserted by mistake, the vendor not being, and not pretending to be, the owner of it. To an action on the covenants for title in the deed, the defendant pleaded these facts as an equitable defence.

Held that the plea was good as pleaded.

Seem, 1. Where a Court of Equity would give unconditional relief, although the procedure necessary to obtain it is unknown to Courts of Law, the matter of defence can be well pleaded as an equitable plea at law.

2. When a contract has been executed, and nothing remains but the relief to be granted against the existing wrong, a Court of law can grant it.

[Chambers, October 27, 1870.—*Mr. Dalton.*]

This was an application by the plaintiff for leave to reply and demur to the defendant's plea.

The action was for breach of covenants for title in a deed of conveyance by the defendant to the female plaintiff of part of lot 5, 7th concession Burford.

The plea, which was pleaded upon equitable grounds, was in substance as follows:—

That the real contract between the parties was for the sale by the defendant to the female plaintiff of twenty acres of said lot 5, adjoining two other lots also part of lot 5, which last-mentioned lots were fenced off, and in the visible occupation of their respective owners; the title to which had never been in the defendant, and which he had never assumed to sell, as was well known to the plaintiff: that with those lots the contract had no concern whatever, but respected, as before said, twenty acres adjoining them:

that by a mistake of the conveyancer, who was employed by both parties, a portion of the said two lots was included in the description in the deed, which was contrary to the intention of the parties, and to their bargain; so that the deed not only conveys the twenty acres really contracted for, but also purports to convey a portion of the said two lots; and that the breach in the declaration alleged upon the covenants for title apply not to any portion of the twenty acres, but to those portions of the two lots, which, but for that mistake, would not have been included in the deed, and should not have been in it at all.

E. B. Wood, for defendant, shewed cause. The plea shews that the plaintiff obtained a conveyance of all the lands to which he was entitled, and that he was let into possession of the same, in addition to the lands included in the conveyance, by mistake. This mistake is shewn to have been made by the conveyancer employed by both plaintiff and defendant. The trial of this case will do complete justice, and it is therefore unnecessary to have the deed reformed as is contended on the other side and, the assistance of the Court of Chancery is not required. A court of law can do complete justice so far as required. This court will allow equitable pleas, although the contract does not disclose the true agreement between the parties.

He cited *Borrowman v. Rossell*, 16 C. B. N. S. 68; *Chilton v. Carrington et al.*, 16 C. B. 206; *Fairweather v. Welchman*, 24 L. J. Chan. 412.

Kerr supported the summons. The plea is bad. The Court of Chancery would not grant an injunction, as it is not shewn that there was mutuality of mistake, nor that the plaintiff accepted the conveyance in its present shape by a mistake, although it is pleaded that he had notice of the adverse title; and the Court of Chancery would not grant an injunction until they had reformed the deed, and then only on condition of defendant conveying that portion of the land which has not been included in the conveyance—the southern limit of the land described.

Mr. DALTON.—The plea in this case is carefully drawn, with much circumstance of detail, and is, I think, a good equitable plea at law.

Equitable pleadings at law have now been discussed for many years, and several limitations have been imposed, arising from the different machinery of Courts of Equity and Courts of Law. There are many cases of mistakes in contracts for which no relief can be given at law—as where the only remedy is to reform the contract, or where from special circumstances the relief would necessarily be qualified with conditions which a court of law could not impose.

But I think it is established by clear authority in the cases cited by *Mr. Wood*, and other cases, that where a contract has been executed, and nothing remains but the relief to be granted against the existing wrong, a Court of Law may grant it as well as a Court of Equity.

And this latter observation seems to me to lead to the true principle to be extracted from the decided cases, upon which such pleadings at law are to be tested. Would a Court of Equity

C. L. Cham.]

LEEMING V. MARSHALL—COCKBURN V. RATHBUN ET AL.

[C. L. Cham.]

grant unqualified relief? No matter through what forms that court would act, that is a matter of the practice of the court merely, if in the result it would give unconditional relief, and a court of law has in the particular case equal means of testing the truth, then the matter affords a defence at law.

I refer particularly to *Wood v. Dwarrie*, 11 Ex. 493, and I cite a portion of the marginal note to that case:—"Where a plaintiff sues on a written contract, and the defendant pleads as a defence matters which he is in Equity precluded from setting up, by a term of the contract not stated in the written instrument, a court of law may, under the C. L. P. Act, give equitable relief without the instrument being first reformed." And I particularly cite *Collett v. Morrison*, 9 Hare 162, where a term of the agreement was left out of a life policy, and Vice-Chancellor Turner decided the case upon the footing of the agreement, and not of the policy, without putting the parties to reform the policy.

Now, what is the case here? The conveyance was made some years ago; the plaintiffs have had full possession of, and title to, all they bargained for; the consideration has been paid; the plaintiffs have nothing they can justly seek from the defendant. What remains is that the defendant should be relieved from a claim now unjustly made, arising from a mistake in drawing the deed.

That, I think, a court of law can grant, and therefore I think this plea good.

LEEMING V. MARSHALL.

Affidavit—Interlineation.

An interlineation in an affidavit, not noted by the commission, does not necessarily avoid it.

[Chambers, November 1, 1870.—*Mr. Dalton.*]

J. B. Read applied to set aside the copy of declaration served, and all subsequent proceedings, for irregularity, with costs, on the ground that at the time of service no declaration had been filed in the office from whence the writ was issued.

One of the affidavits on which the summons was obtained, put in to show that no declaration had been filed, had these words interlined without being noted by the commission: "At which office the writ in this cause was issued."

McDonald showed cause and objected to the above affidavit on the ground, that the interlineation was material, and was not initiated by the Commissioner, as required by the practice: *In re Fagan*, 5 C. B. 486.

J. B. Read, contra.

Mr. DALTON.—The order must be made as asked, to set aside copy of declaration served, with costs.

The practice referred to in *In re Fagan*, 5 C. B., has not prevailed in this country: *Lyster v. Boulton*, 5 U. C. Q. B. 832.

Order accordingly.

COCKBURN V. RATHBUN ET AL.

Declaration before appearance.

An attorney who should have entered an appearance for defendants on 22nd did not do so until 25th. On the 24th the plaintiff filed and served declaration. The defendants, by the same attorney, then applied to set aside the copy and serve of declaration on the ground that at the time of declaring no appearance had been entered, but

Held that as the attorney had authority to act as such the service could not be set aside.

[Chambers, Nov. 1, 1870, *Mr. Dalton.*]

The summons in this case was to set aside the service of the declaration, or the copy and the service, or one or both, and the notice to plead served on the agents of the defendant's attorney, or as attorney for defendant, Hugo B. Rathbun, with costs, as irregular, on the ground that no appearance was entered on behalf of the defendants, the said attorney, at the time of such service, and also on the ground that neither the writ of summons, or judges order, nor affidavit pursuant to the 56th sec. of the C. L. P. Act was filed, with a copy of the said declaration filed, and on the ground that the plaintiff had no authority to serve the said attorney or his agents as attorney for the defendants, and on further grounds disclosed in affidavits and papers filed.

The only affidavit filed was the affidavit of the defendant's attorney himself, sworn on the 26th October, wherein he stated that he was the attorney of the defendants in the cause; that on the 13th October, the summons was personally served on the defendant Edward Rathbun, by the Sheriff of Hastings, and that he the attorney on that same day, accepted service of the summons for the defendant Hugo, the writ not being specially endorsed; that on the 24th of October the declaration and notice to plead were served on deponent's Toronto agents, as he was advised by letter, enclosing the declaration, received by him on the 25th; that no appearance was entered for either of the two defendants until the 26th of October, when deponent caused an appearance to be entered for both defendants; that when the said declaration was served on the agents (the 24th) there was no appearance entered for the defendants, or either of them, by deponent, as their attorney.

Osler shewed cause.

Lauder, contra.

Mr. DALTON.—As to the bearing of these facts upon the present application, it is to be observed that the declaration itself and the filing of it are not attacked by the summons; it is the copy and service that are sought to be set aside. The summons assumes, therefore, the declaration itself and the filing to be regular. Whether they are so or not, I have not to enquire.

Is the service, then, on *Mr. Holden* good as to both defendants?

The appearance was due by both defendants on the 22nd of October. *Mr. Holden*, it is evident, was then attorney in fact for both defendants—in truth, there is no objection that he was not such attorney—but the objection is that he had not entered an appearance when the declaration was filed and served. As respects the defendant *Hugo*, for whom he accepted service on

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the 13th, I think he then became bound, as between himself and the plaintiffs, to enter the appearance on the 22nd. Evidently he was Hugo's attorney from the 13th. The facts show that he was equally the attorney of the other defendant. And I understand he makes this application as attorney for the defendants.

Then what suppose he had not entered an appearance, or never enters an appearance, he is still the attorney of the defendants; and the only ground upon which, as I take it, this service could be set aside, would be the actual want of authority in Mr. Holden to act as attorney.

I have regarded very strictly the application to set aside the service of this declaration, as I think it my duty under the circumstances; and as the summons is moved with costs, I must discharge it with costs.

NOVA SCOTIA.

IN THE SUPREME COURT.

AVON MARINE INSURANCE Co. v. BARTEAUX.

[Halifax, Nova Scotia, 1870.]

This was a special case stated for the opinion of the Court, and involving questions of general and particular average. The latter was withdrawn in the course of the argument and the former turned upon the obligation of the underwriter to pay the general average upon a foreign adjustment. The defendant pleaded such an average by way of set-off to an action on the premium note, and the admitted facts are, that the defendant being a British subject, resident in this Province, and having insured his brigantine, "The Foyle," on a time-policy with the plaintiffs, the vessel on a voyage from Liverpool to New York, sustained damage, which was the subject of general average, and if adjusted at New York, would amount to a larger sum than if adjusted in Nova Scotia. The single point, therefore, for our determination is, by what law ought the general average to be ascertained—by the usage as it prevails in New York, or by the usage of our Province where the policy was made.

Although the weight of authority is in favor of foreign adjustment, this must still be considered one of the *vezatae questiones* in mercantile law. In 1 Parsons on Maritime Law, 382, edit. 1859, he cites in note 4 a number both of English and American cases, where the adjustment made at a foreign port was held not to be binding on an insurer, and where it was held, that it was so binding. The latter case, however, being the later in point of time, and of the higher authority.

The leading English case which figured so largely at the argument is that of *Simonds v. White*, 2 Barn and Cres., 805, decided so far back as 1824, Lord Tenterden there puts it on the footing of a known maritime usage, which the shipper of goods must be taken to have tacitly if not expressly assented to, and by assenting to general average, he must be understood to assent also to its adjustment at the usual and proper place, that is at the home port or the port of

destination and discharge. If the shipper is so bound it is plain that he will not be indemnified under his policy if the underwriters be not equally bound. In *Strong v. N. Y. Fire Insurance Company*, 11 Johns, 823, Van Ness, J., in giving the opinion of the Court, said:—"There is no principle more firmly established than that the insurers are bound to return the money which the insurer has been obliged to advance in consequence of any peril within the policy, provided it be fairly paid, and does not exceed the amount of the subscription."

Arnould, in his treatise in Insurance 2—947, argues with irresistible force that it seems impossible, on general principles, to arrive at any other conclusion. The law of England compels the owners of the several interests (that is the ship, cargo, &c.) to pay all general average charges assessed on them by foreign adjustment, if settled according to the law of the port where it is made, whether such charges would be allowed in England or not. Now it seems certain that the English underwriter must be bound by the very terms of his contract to reimburse to the assured their proportion of all such general average charges as they (the assured) have been compelled to pay by the law of England. If this be so, and it seems quite incontrovertible, then it follows by necessary inference, that the underwriter is bound to reimburse all such general average charges as have been assessed on the insured by a foreign adjustment, if correctly settled according to the law of the port of adjustment.

Several of the cases cited at the argument rest upon distinctions which have no application here. A foreign adjustment, to be binding, must be clearly proved to have been made in strict conformity with the laws and usages of the foreign port, and it would doubtless be set aside, or corrected for fraud or gross error.

The case in hand is relieved of all such inquiries, as we have merely to settle the principles on which the adjustment is to be made.

It was ingeniously argued by Mr. MacDonald, for the insurers, that, supposing the rule to be established on a voyage defined in the policy, and extending to foreign ports, where the operation of the rule might be fairly contemplated, it would not apply to a time policy, as in this case. But a time policy, unless there be special restrictions, confers the power of sailing for every port, domestic or foreign; and in our own Province, whose ships are to be found in every sea, and where the ship, once launched, often instantly embarks in foreign commerce, and never returns perhaps to her home port, foreign employment must be understood to be as much in the contemplation of the shipowner and insurer as domestic use. No authority, besides, was cited for this construction.

The only English case that seems to have touched this question since 1865 is that of *Fletcher v. Alexander*, 18 L. T. Rep. 434, decided in 1868. There Bovill C. J., observed "that different countries had adopted different rules, with regard to almost every point connected with the statement of averages. Upon the general principle all are agreed, but with those differences in the law of different countries, it became necessary to ascertain and determine what law

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was to prevail when a vessel started from a port in one country and its destination was in another, or where the adventure came to an end in some intermediate port. And it has now been the adopted and settled law of this country, and I believe most other countries, that the adjustment must take place according to the law of the place where the adjustment is to be settled."

In 2 Parsons on Insurance 360, 370, all the cases, except the last, are reviewed, and many subtleties are suggested, which will doubtless be resolved as new cases arise. He assigns the principal reasons why a foreign adjustment should bind owners and shippers, and concludes that the rule, like some others of the law merchant, is founded on the average of all the cases, and, on the whole, does justice. If this be allowed, it is as much, perhaps, as can be attained. Average justice is a significant expression which I do not remember to have found in any of the cases. It is here in a text book of authority, and I met with it recently in a production of another stamp, from which it may not be amiss to extract one or two paragraphs. I refer to a thoughtful and brilliant lecture delivered on the 1st of November last, by the Lord Justice Clerk of Scotland to the Edinburgh Juridical Society, where he vindicates the law and its professors from the reproaches often ignorantly cast at them, and justly observes that in the systems of science there is quite as much uncertainty as in the system of law—indeed, a great deal more. Lawyers, he says, are not only much more harmonious among themselves than some other professions, but the system and science of law is more consonant with itself and there are fewer real disputes upon fundamental matters than in almost any other branch of human knowledge. It is only this, that the differences of opinion between lawyers, that is, between courts administering the law, come so close home to all our social relations, and tell so greatly upon domestic comfort and personal rights (as, for instance, in the varying law upon the question of marriage) that such differences of opinion assume much larger proportions in consequence of their practical application, than if they were occurring in a more scientific and theoretical dispute. But then we are met on the threshold with the old and vulgar notion—that the part of a lawyer is, after all, an unworthy one, and that truth and falsehood find no place in his vocabulary and in his science. In one sense that is perfectly true, because law is not conversant with truth or falsehood, in that sense. Law aims at nothing more and can attain nothing more than average justice. It is the general rule made before hand to embrace a given category of circumstances, and in its application, individual wrong is often unavoidable. The facts being accurately ascertained, the general principle is then to be applied. The worse cannot appear the better reason, because that must be taken to be the better reason which the Court, after argument approves, and that is the worst reason which it disapproves, and that is the end of it.

Apply this philosophical principle to the case in hand, and looking to the average justice which the cases recognize, we are of opinion, in answer to the third question submitted to us, that the insurers are bound to pay the general

average on an adjustment to be made at New York in conformity with the laws and usages of the United States.

GENERAL CORRESPONDENCE.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—I wish to draw your attention to the 60th section of the Dominion Statute, 32, 33 Vic. cap. 22 (1869), whereby, without declaring such offences as are therein provided against, to be crimes or misdemeanors, it is declared, that "whosoever *unlawfully* or maliciously commits any damage, injury or spoil to or upon any real or personal property whatsoever, either of a public or private nature for which no punishment is hereinbefore provided, shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding \$20, as to the justice seems meet, and also such further sum of money as appears to the justice to be a reasonable compensation," &c.; "which last mentioned sum, &c., shall be paid to the party aggrieved," &c., and if the moneys are not paid with costs, "the justice may commit the offender to the common gaol, &c., not exceeding two months, &c., and kept at hard labor, &c.; Provided that nothing therein contained is to extend to cases where the party acts under a fair and reasonable supposition that he has a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game," &c.

Now it occurs to me to enquire of you, that as the words "unlawfully or maliciously" are disjunctive, whether or not any complaint for a trespass where the damage is within the prescribed amount, and there can be no pretence for the party acting under a supposition of right, may be tried summarily by a justice of the peace under this statute? because every trespass is "unlawful" whether it be "malicious" or not.

Most of the preceding sections constitute particular acts "unlawfully and maliciously" committed, misdemeanors or felonies, and certain other acts of a more grievous nature are constituted felonies; or the words "unlawfully" and "maliciously" are coupled by the conjunction "and." So that if there exists no doubt (which I do not admit) as to the power of the Dominion Legislature over that

GENERAL CORRESPONDENCE.

class of cases. I should like your opinion as to whether or not the jurisdiction of prescribing a remedy for a civil trespass does not belong exclusively to the Provincial Parliament under the British North America Act, 1867?

I observe the Acts respecting petty trespasses in Upper Canada, Con. Stat. U. C. cap. 105, and Statute of Canada, 25 Vic. cap. 22, remain unrepealed. I imagine if either were to be repealed it would have to be done by the Provincial Parliament under the 18th sub-section of section 92 of the British North America Act, 1867; and if similar or any other provisions were to be made by the same Parliament it might well be done under the 15th sub-section of the same section, because there is power given to impose punishment by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in that section. The Dominion Act of 1869 purports to repeal the 28th section of Con. Stat. of Canada, cap. 93, as set forth in Schedule B. of Dominion Statute of 1869, cap. 36, p. 410, unless the second paragraph of the 1st section, which provides a very wide field for thought and consideration, that "such repeal shall not extend to matters relating solely to subjects as to which the Provincial Legislatures have under the B. N. A. Act, 1867, exclusive powers of legislation," limits the repeal, and withholds from its provisions certain cases of petty trespass.

It would be interesting to know your opinion as to whether section 28 of Consolidated Statutes of Canada, cap. 93, or the section of the Dominion Statute just referred to is to be regarded as the sole authority for a summary proceeding for a petty trespass not maliciously committed. You will observe that the terms 60th section of the Dominion Statute, and of the 28th section of the Consolidated Statutes of Canada, cap. 93, are not the same. The terms of the latter are, "If any person *wilfully or maliciously* commits any damage," &c., and the terms of the former are, "Whosoever *unlawfully* or maliciously commits, &c., any damage," &c.

Yours, &c.,

February, 1871.

UNION.

[The above affords an argument for the existence of a competent court to settle all such questions, and thereby avoid involving

people who have to administer the law in trouble. The subject is well deserving discussion. If the expression of our opinion would probably serve a useful purpose, we should not hesitate to consider it in all its bearings. It involves one of many difficult questions of constitutional law which will present themselves for decision under our new political state of existence; but because those of our subscribers who are magistrates, and who are not supposed to be well versed in law, may be misled, we think it well to say as to the first question put by "Union," that the 92nd section of the B. N. A. Act, 1867, confers upon the Provincial Legislature the power (to the exclusion of the Dominion Parliament) to make laws in relation to property and civil rights; and, as a general proposition, we think with that power goes the right to legislate, prescribing remedies and punishments for trespass or injuries thereto—for whatever affects the subject at all, the power to legislate upon it must be confined to one jurisdiction, and cannot be divided between the two legislative bodies—that is, for anything short of, or apart from, a criminal offence. If it be considered necessary to constitute any act or trespass relating to property, or any other subject, a crime, the Provincial Parliament would still possess the undoubted right to prescribe and control the *civil* remedy; the Dominion Parliament alone would have the exclusive jurisdiction to declare the crime and prescribe the procedure and the punishment; but nothing short of enacting a law declaring the crime would take the remedy out of the jurisdiction of the Provincial Legislature.

As to the last question in "Union's" letter, we think the word "maliciously" does not materially affect the question, unless the Dominion Parliament were to declare that the "wilfully AND maliciously," or "wilfully OR maliciously," or "unlawfully OR maliciously" doing certain acts affecting a man's property or civil rights should constitute or be declared a crime or misdemeanor; and for want of that exercise of jurisdiction, we are, as at present advised, of opinion that the 22nd section of C. S. of Canada, c. 93, is still in force, and that it will be probably decided by the Dominion General Court of Appeal when constituted, and that if the Dominion Parliament chooses to exercise jurisdiction on the subject it can only be done by way of making a law

SPRING CIRCUITS, 1871—CHANCERY SPRING SITTINGS.

in such a form that there will be no doubt of its intention to declare certain acts affecting property and civil rights crimes.

It has been held that whenever the imposition of punishment may be by imprisonment for enforcing any law, that such is to be regarded as criminal law; but we apprehend that that could be scarcely held to apply to our Constitutional Act of 1867, because, as observed by "Union," the power to impose such punishment is expressly conferred upon the Provincial Legislatures for enforcing any law of the Province made in relation to any matter coming within any of the subjects concerning which exclusive jurisdiction is conferred upon them; whilst jurisdiction as to the criminal law and procedure in criminal matters is expressly withheld.

There is another question which may arise out of the peculiar provisions of the B. N. A. Act, 1867, that is not touched by "Union," which it may interesting to consider; and it is this:—Although the Dominion Parliament may declare the criminal law, and prescribe the procedure in criminal cases, what right has that body to pass any enactment constituting a jurisdiction for the trial of criminal offences when the Provincial Legislatures have exclusively the jurisdiction conferred upon them by the 14th sub-section of the 92nd section of organizing Provincial Courts of both civil and criminal jurisdiction?—unless the enactment of the 101st section, which gives the Dominion the power of establishing any additional courts for the better administration of the laws of Canada, means that, notwithstanding the power so conferred on the Provincial Legislatures, the same jurisdiction exists in the Dominion Parliament—Eds. L. J.]

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EASTERN CIRCUIT.—*Mr. Justice Wilson.*

Brockville	Tuesday	March 21
Perth	Tuesday	" 28
Ottawa	Monday	April 3
Kingston	Wednesday	" 12
Cornwall	Tuesday	" 25
L'Original	Monday	May 1
Pembroke	Monday	" 8

MIDLAND CIRCUIT.—*Mr. Justice Morrison.*

Whitby	Monday	March 20
Napanee	Monday	" 27
Cobourg	Monday	April 10
Lindsay	Monday	" 17
Peterborough	Friday	" 21
Picton	Tuesday	May 2
Belleville	Friday	" 5

NIAGARA CIRCUIT.—*Mr. Justice Galt.*

Hamilton	Monday	March 20
Milton	Wednesday	April 12
St. Catharines	Monday	" 17
Welland	Monday	" 24
Barrie	Monday	May 1
Owen Sound	Tuesday	" 9

OXFORD CIRCUIT.—*The Chief Justice of the Common Pleas.*

Guelph	Monday	March 20
Woodstock	Monday	" 27
Berlin	Monday	April 3
Brantford	Monday	" 10
Stratford	Monday	" 17
Cayuga	Tuesday	" 25
Simcoe	Tuesday	May 2

WESTERN CIRCUIT.—*The Chief Justice of Ontario.*

Sandwich	Tuesday	March 21
Chatham	Tuesday	" 28
Sarnia	Tuesday	April 4
St. Thomas	Tuesday	" 11
London	Monday	" 17
Goderich	Tuesday	May 2
Walkerton	Tuesday	" 9

HOME CIRCUIT.—*Mr. Justice Gwynne.*

Brampton	Tuesday	March 21
Toronto	Tuesday	" 28

CHANCERY SPRING SITTINGS.

TORONTO.

(Hon. Vice-Chancellor Mowat.)

Toronto	Monday	March 20
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HOME CIRCUIT.

Hon. Vice-Chancellor Mowat.

Guelph	Thursday	April 20
Brantford	Monday	" 24
St. Catharines	Thursday	" 27
Whitby	Monday	May 15
Hamilton	Friday	" 19
Lindsay	Friday	" 26
Barrie	Monday	" 29
Owen Sound	Thursday	June 1

EASTERN CIRCUIT.

Hon. the CHANCELLOR.

Ottawa	Wednesday	April 5
Cornwall	Monday	" 10
Brockville	Monday	" 17
Kingston	Wednesday	" 19
Belleville	Wednesday	" 26
Cobourg	Tuesday	May 9
Peterboro'	Tuesday	" 23

WESTERN CIRCUIT.

Hon. Vice-Chancellor Strong.

Stratford	Tuesday	March 21
Goderich	Friday	" 24
Sarnia	Wednesday	" 29
Sandwich	Saturday	April 1
Chatham	Tuesday	" 4
London	Friday	" 7
Woodstock	Friday	" 14
Simcoe	Tuesday	May 9

By the Court,

A. GRANT,
Registrar.

PAYMENT OF EXECUTORS.

DIARY FOR APRIL.

1. Sat. Last day for Collector to return roll to Treasurer. Clerks and Deputy Clerks of Crown and Master and Registrar in Chancery to make quarterly return of fees.
2. SUN. Palm Sunday.
3. Mon. County Court (York) Term begins.
7. Frid. Good Friday.
8. Sat. County Court Term ends.
9. SUN. Easter Sunday.
11. Tues. Last day for Master and Registrar in Chancery to remit fees to Provincial Treasurer.
16. SUN. 1st Sunday after Easter.
23. SUN. 2nd Sunday after Easter. St. George.
25. Tues. St. Mark.
29. Sat. Last day for Articles, &c., to be left with Secretary Law Society. Last day for Clerk to return occupied lands to County Treasurer.
30. SUN. 3rd Sunday after Trinity.

THE

Canada Law Journal.

APRIL, 1871.

PAYMENT OF EXECUTORS.

SECOND PAPER.

It remains now to consider the scope and application of the enactment in the Consolidated Statutes of Upper Canada, and the rates of compensation which have been sanctioned thereunder by the Court of Chancery in the administration of estates. There are no reported decisions of the practice pursued in the Surrogate Courts; but there is little doubt that those tribunals follow the rules laid down by the Superior Court, in passing executors' accounts.

I. Jurisdiction of Chancery as to compensation.—In one of the first cases after the statute, Vankoughnet, C., laid down lucidly the grounds upon which his Court fixed the rates of compensation to executors. He says:

"Until the statute, no administrator, as such, could claim any allowance for his services. This rule, in regard to persons holding fiduciary relation, was established early in Courts of Equity, and was inflexible; but it was a rule forged, as it were, by the Court itself, and which the Legislature has broken.

"I have been asked whether the Court would refer it to the Judge of the Surrogate Court to fix the rates of remuneration. As a rule, this Court does not leave its work incomplete, nor ask the aid of other tribunals to perfect it. Seised of the subject-matter of litigation or dispute, it disposes of it entirely; and in this particular of remunera-

tion, almost more than any other, the Court which has surveyed the conduct of the trustee, has taken the accounts, and has adjudicated upon them, is the most competent to form an opinion. Being relieved from the restriction which in this respect it had imposed upon itself, it will not seek elsewhere for an opinion as to whether remuneration should be allowed to the trustee for his labours, or what the amount of that remuneration should be." *McLennan v. Heward*, 9 Gr. 279.

It has been the settled practice of the Court of Chancery for the Master, in passing the accounts of executors, to allow them compensation under the Statute, instead of putting the executors to the expense of procuring an order for such compensation from the Surrogate Judge. This new principle of compensation to executors being introduced, it became a principle of the law, which the Court of Chancery has uniformly acted upon in the administration of estates. It is now the duty of the Master, in taking accounts and making all just allowances, to make a just and proper allowance for such compensation, which he can better do, from his knowledge of the estate, than the Surrogate Judge: *Biggar v. Dickson*, 15 Gr. 233. It is not competent, therefore, for an executor, who is passing his accounts in the Court of Chancery, to intercept the judgment of the officer of this Court who has cognizance of the matter, by an application to the Surrogate Judge for an allowance. Any order made under such circumstances by the Surrogate will not be binding in the Court of Chancery as fixing the amount, but the Master must exercise his own judgment as to the propriety and reasonableness of the allowance: *Long v. Wilmot*, cited in 15 Gr. 236; and *Biggar v. Dickson*, 15 Gr. 233. By making such application to the Surrogate, pending a suit in Chancery, unnecessary expense is incurred, and the Surrogate cannot tell what the conduct of the executor has been, or in what manner he has administered the estate. At the instance of any party interested, the Court of Chancery will restrain any such application by the executor: *Cameron v. Bethune*, 15 Gr. 486.

It would seem, however, that if the parties have allowed the amount to be fixed by the Surrogate Judge, and make no objection thereto, the Court will adopt it. And the same result would follow if the allowance had been made before the institution of the suit

PAYMENT OF EXECUTORS.

in Chancery: *Harrison v. Patterson*, 11 Gr. 105; see s. c., 7 Gr. 531.

II. *Scope of the jurisdiction.*—The Court will not extend this act to all trustees, but to those only who act under wills or testamentary dispositions of property. In other cases the general rule applies as it obtains in England: *Wilson v. Proudfoot*, 15 Gr. 109. Soon after the act was passed, it was held that compensation was thereby authorized to trustees and other persons acting under wills in respect of real estate, as well as to executors in respect of personal estate. This has always been followed, and may now be regarded as the settled rule of the Court on this point: see *Bald v. Thompson*, 17 Gr. 157, 158.

III. *Grounds upon which compensation is allowed, or disallowed.*—In considering in what cases remuneration should be awarded, it is of value to bear in mind the considerations which influenced the Court formerly in refusing any allowance. One, if not the principal consideration was, that the trustee might not make his duty subservient to his interest—that he might not create work with which to charge and load the estate. If it was considered necessary to remove every temptation of this kind, by refusing all payment for such work, it may fairly be argued that it never could have been intended by the Legislature that the trustee should be paid when he had not done the work, or had done it in such a way as to prejudice the estate or benefit himself.

The statute means that for such portion of the duties as the executor has bestowed his care, pains, trouble and time upon, in the proper administration of the estate, he shall receive reasonable compensation. When he has neglected any portion of his duties, or has applied his care and pains in mal-administration, it would scarce be asked that in respect of it, however much trouble may be brought upon him thereby, he should receive any wages or reward. The Legislature did not intend that when an executor had been guilty of any misconduct he should be deprived of any remuneration whatever, even in respect of those partial services which had been faithfully rendered. The statute evidently contemplates and indeed provides for payment of work from time to time. Looking to the large powers which this act presumes to compel defaulting trustees and executors to make amends for

their misconduct, it would not have been considered necessary to deprive them, any more than any other agent, of payment for what had been well done: *McLennan v. Heward*, 9 Gr. 279.

The compensation is for care, pains, and trouble, and time expended: hence as a general rule an executor should not be allowed commission on sums which he has not realised and with which he is chargeable in consequence of his neglect or other misconduct: *Bald v. Thompson*, 17 Gr. 154. In respect of all moneys disbursed by him, the executor should have his commission, and if disallowed by the master the court will rectify his finding in this respect: *Ib.* In no case will executors be entitled to any allowance for services performed for the estate by another person who acts gratuitously, unless it can be shewn that they had labour and trouble during the same time in the management: *Chisholm v. Barnard*, 10 Gr. 479.

The misconduct of an executor may be punished, not merely by charging him with interest and costs, but also by the disallowance of all compensation to him under the statute, his right to such compensation depending altogether upon the circumstances of the case, having regard to whether or not his conduct has been blameworthy: *Gould v. Burritt*, 11 Gr. 523. When an executor has retained moneys of the estate in his hands, and has been charged with interest and rests in passing his accounts, yet he will not be deprived of his commission if he acted in the exercise of his best discretion in keeping such moneys in hand: *Gould v. Burritt*, *ubi sup.*, and see *McLennan v. Heward*, 9 Gr. at pp. 284, 285; *Landman v. Crooks*, cited in 9 Gr. 285.

If the executor deal with the estate in a manner not authorized by the will, but yet in the event his dealings assume a shape sanctioned by the will, a commission may be allowed in respect of such transactions, if they have been as profitable as if the directions of the will had been strictly followed; but if less profitable, then no commission should be allowed: *Thompson v. Freeman*, 15 Gr. 384.

We shall in our next and last paper on this subject arrange the remaining cases under their appropriate heads.

TREASURER OF THE LAW SOCIETY.

TREASURER OF THE LAW SOCIETY.

We publish with much pleasure the following address to the late Treasurer of the Law Society by his brother Benchers on the occasion of the last meeting of Convocation under the late *regime* and his answer thereto :—

"To the Hon. John Hillyard Cameron, Treasurer of the Law Society of the Province of Ontario :

"SIR,—On the occasion of the approaching dissolution, under the recent act of the Legislature of Ontario, of the corporation of the Law Society as constituted at the end of the last century, we, the Benchers of that honourable society, of which you have been the Treasurer for eleven years, cannot allow the last term in which we shall be assembled together, to close, without giving expression to our feelings of regard and esteem for you, and our sense of the great benefits that have accrued to the profession at large from your unwearyed labours and constant supervision, as the head of its governing body, the good effects of which are every day more distinctly felt and acknowledged.

"During your Treasurership many useful measures have been originated, among which we may particularize the creation of the Law School, and the establishment of Scholarships, both of which have tended so materially to the benefit of students; while the courtesy which you have at all times exhibited to the members of the Bench, and of the Profession in general, have contributed so much to that good feeling and pleasant intercourse which ought always to mark an honourable profession, and we believe does now essentially exist in ours.

"We sincerely hope that under the new organization of the Law Society, its members may lose none of the advantages that they have hitherto enjoyed, and that our successors to be elected by the Bar throughout the Province, may maintain the standard of legal education that you so happily inaugurated, and which has already borne such excellent fruit.

"In bidding you farewell in our old relations, we offer to you our warmest regard, and we know that in whatever position you may hereafter be placed, your most earnest endeavours will continue to be used in the promotion of a good understanding and high tone among the members of our common profession.

To this address the Treasurer replied as follows :—

"Gentlemen and Brother Benchers :

"Allow me to offer to you my warmest thanks for your kind and flattering address.

"The position of Treasurer of the Law Society of Upper Canada has always been to me a source of the greatest satisfaction and pride, and the knowledge that you have conferred it upon me by your unanimous voices for eleven years in succession, and now, in the breaking up of our old constitution, that you as unanimously give me your approval of my course while acting as your head rewards me amply for those labours and efforts which you have been kind enough to eulogize.

"You are all aware how deep an interest I have ever taken in my profession, and how anxious I have been that our young men who have become students of the law should have every opportunity of acquiring the highest legal education and of adopting the best means of fitting themselves for practice at the Bar; and if the measures which you have aided me in passing, have been attended in their results with some degree of success, you are yourselves entitled to share in any meed of praise that may be awarded to them.

"If in my position I have acted in a spirit of courtesy towards yourselves and the other members of the Law Society, I have only acted in the spirit that the uniform kindness and consideration that have always been shown to me have called forth, and I have specially to thank those hundreds of students who have been before me in the legal examinations for the forbearance and good feeling that they have uniformly exhibited, which have never been departed from, even in cases where the result of the examinations has been adverse.

"I trust that the Law Society will be managed under its new organization in the same spirit it has hitherto been. The honor and interests of the Bar should be as safe in the hands of the whole body as they have been in the hands of a few of its senior members. The standards of merit and position cannot fail to be recognized by the profession at large, as the true standard for election to its governing body; and, as in the past, no disturbing element outside of their professional work or duty has ever been introduced among the benchers, so, we will hope, it may be in the future.

"I thank you for your kind expressions of personal regard. It is pleasant to me to remember, now that our old relations are being severed, that in all our intercourse I have never had the slightest difficulty with any one of you, and I can assure you that you judge me truly when you say that my most earnest endeavours will continue to be used in the promotion of a good understanding and high tone among the members of our common profession."

ELECTION OF BENCHERS.

All lovers of our profession will also hope that the result of the elections may show that the standards of merit and position will not fail "to be recognized by the profession at large as the true standard for election to its governing body." The intelligence, *esprit de corps* as well as business ability of the Bar of Ontario ought to keep them right in a matter of this kind, and we hope it may do so, despite the corroding influences of elective institutions.

It may not be amiss here, when the last Treasurer under the old system is giving his closing address, to give the names of those who have held the office up this time. The first that appears on the list is John White, in 1797. Then follow, generally chosen several years in succession and some returning again from time to time:—Robert Isaac Dey Grey, Angus Macdonell, Thomas Scott, D'Arcy Boulton, William Warren Baldwin, John Beverley Robinson, Henry John Boulton, George Ridout, Robert Baldwin Sullivan, Robert S. Jameson, Levis Peter Sherwood, William Henry Draper, James Edward Small, Robert Easton Burns, John Godfrey Spragge, Robert Baldwin, Sir James B. Macaulay, John Hillyard Cameron.

ELECTION OF BENCHERS.

As most of our readers are aware, two lists have been distributed amongst the profession, suggesting the names of various gentlemen as Benchers under the elective system: the first emanating from a meeting of some of the members of the Hamilton Bar, and the second from Toronto. Both lists contain many good names, and persons who doubtless possess the confidence of their brethren. But in view of the ground we have taken in this matter, we desire to make a few observations, which may assist in rectifying, and in some respects reconciling these lists; and out of both, with a few alterations, making one more acceptable to the bulk of the profession.

To begin with, we must not run away with the idea that there is any necessity or even possibility of representing the different sections of the country. The Society is to be looked to as a whole, irrespective of the incidental fact that the members of it are scattered in different parts of the Province, although proper deference must be paid to the feeling of the

country Bar in this respect. We must also keep in view the fact that the routine work of the Society must be done in Toronto, and that we cannot expect country Benchers to be as regular in their attendance as Toronto men, especially as, when they do attend, they must do so at their own expense. Nor should the country Bar forget that all the *ex-officio* Benchers, except one, reside out of and east of Toronto.

Great surprise has been expressed on all sides, so far as the Hamilton list is concerned, at the selection of names from the Hamilton Bar itself; not of course arising from any objection to any of those who are on the list, but surprise that names which the Bar would have expected to have seen there, are absent. We trust that such names as George W. Burton, Miles O'Reilly and S. B. Freeman, have been omitted by inadvertence, for certainly there would seem every reason to suppose, if a selection has to be made from any one locality, that they would be elected in stead of their juniors, who appear on the list referred to.

Again, with reference to the Toronto list, one would expect to see Mr. Edward Blake's name; for if we have to make a selection between the brothers, the senior would naturally be chosen; but it is unnecessary further to particularise, nor is it pleasant to feel that we have to leave out any name when so many good ones present themselves; only thirty, however, can be elected, and we sincerely trust that the good sense and brotherly feeling of the members of the bar one to the other will prevent any thought of jealousy, and that all will get the credit for voting for those whom they conscientiously believe will individually and collectively be the best fitted, from a combination of qualities, to form the governing body of the Law Society.

It may not occur to some, and we therefore take the liberty of reminding them, that business capacity, and spare time to attend to Law Society business are important elements for consideration, and should be kept in view in this selection of Benchers.

We publish the following list at the suggestion of several members of the Bar who could not attend the meeting here, and of some of the country Bar, who have taken an interest in the matter, and who do not altogether approve of the lists that have been sent out;

ELECTION OF BENCHERS—ACTS OF LAST SESSION.

and though we do not concur with it in every particular, we confess to thinking it, on the whole, the best that has so far been circulated—at least it may suggest some fresh names :

1. J. D. ARMOUR Cobourg.
2. H. C. R. BECHER..... London.
3. JOHN BELL Belleville.
4. EDWARD BLAKE..... Toronto.
5. G. W. BURTON..... Hamilton.
6. JOHN CRICKMORE Toronto.
7. JOHN CRAWFORD Toronto.
8. S. B. FREEMAN or E. IRVING Hamilton.
9. R. A. HARRISON..... Toronto.
10. JAMES A. HENDERSON Kingston.
11. S. B. HARMAN..... Toronto.
12. J. B. LEWIS Ottawa.
13. W. R. MEREDITH..... London.
14. AND. LEMON or G. PALMER, Guelph.
15. THOMAS MOSS..... Toronto.
16. DALTON MCCARTHY, JUN. . . Barrie.
17. ROLLAND McDONALD..... St. Catharines.
18. KENNETH MCKENZIE Toronto.
19. JAMES MACLENNAN..... Toronto.
20. D. McMICHAEL..... Toronto.
21. MILES O'REILLY..... Hamilton.
22. T. B. PARDEE..... Sarnia.
23. C. S. PATTERSON Toronto.
24. ALBERT PRINCE Sandwich.
25. D. B. READ..... Toronto.
26. S. RICHARDS or A. CROOKS, Toronto.
27. R. W. SCOTT Ottawa.
28. M. R. VANKOUGHNET Toronto.
29. E. B. WOOD Brantford.
30. R. S. WOODS Chatham.

Some may have sent in their lists before seeing this; but if they desire to make any changes, they have a perfect right to send in a fresh list, and recall the former one.

Attention has at length been drawn, in the House of Commons, to a subject which must sooner or later, and the sooner the better, receive the careful attention of the Legislature. We speak of a Court of Admiralty for our inland seas. Years ago we urged the importance of some such measure as is foreshadowed—though in a feeble and imperfect manner—in the following resolutions, introduced by Mr. Street:

1. That it is expedient that power be given to attach ships and vessels for provisions furnished and repairs made to them, by a summary process.

2. That where there is no Admiralty Court or Admiralty jurisdiction, such process shall issue out of the County Court or Court of Inferior Jurisdiction.

3. That under such process proceedings may be had to judgment, and ships or vessels so attached may be sold thereupon.

4. That a Bill shall be founded on these resolutions, with the necessary forms of procedure thereon.

These resolutions were, after a debate, withdrawn; but the subject is too important, and the necessities of our marine too great, to allow it to be shelved for any length of time.

ACTS OF LAST SESSION.

An Act to amend the Act intituled "An Act respecting the Municipal Institutions of Upper Canada."

(Assented to 15th February, 1871.)

Her Majesty, &c., enacts as follows:—

1. Section 6 of the Act passed in the thirty-first year of Her Majesty's reign, chaptered thirty, is amended by adding the following words after the word "ward" on the third line of said section:—"When there are less than five wards, and of two councillors for each ward where there are five or more wards."

2. Sub-section 12 of section 296 of the Act passed in the session held in the 29th and 30th years of Her Majesty's reign, chaptered 51, is amended by striking out all the words after the word "Runners" in said sub-section.

3. Sub-section (a) of sub-section 6 of section 246 of the said Act is repealed, and the following is substituted in lieu thereof:—"Upon any person, for the non-performance of his duties, who has been elected or appointed to any office in the corporation, and who neglects or refuses to accept such office, unless good cause be shown therefor, or takes the declaration of office, or afterwards neglects the duty thereof, and."

4. The council of every municipality may pass by-laws for preventing and removing any obstruction upon any roads or bridges within its jurisdiction.

5. Sub-section 8 of section 299 of the said Act is amended by adding thereto the following:—"And for acquiring and assuming possession of, and control over, any public highway or road in an adjacent municipality (by and with the consent of such municipality, the same being signified by a by-law passed for that purpose), for a public avenue or walk; and to acquire from the owners of the land adjacent to such highway or road, such land as may be required on either side of such highway or road, to increase the width thereof, to the extent of one hundred feet or less, subject to the provisions of section 825 of this Act, and to other provisions of this Act relating to arbitration."

6. The following sub-section is added to section 849 of said Act:—"For granting bonuses to any railway, and to any person or

ACTS OF LAST SESSION.

persons, or company, establishing and maintaining manufacturing establishments within the bounds of such municipality, and for issuing debentures, payable at such time or times, and bearing or not bearing interest, as the municipality may think meet for the purpose of raising money to meet such bonuses."

7. Section 341 of the said Act is amended by adding after the words "Separating two townships in the county," the following:—"And over all bridges crossing rivers, over five hundred feet in width, within the limits of any incorporated village in the county, and connecting any highway leading through the county."

8. Section 342 of said Act is amended as follows, by adding thereto the following words: "And further the County Council shall cause to be built and maintained in like manner all bridges on any river over five hundred feet in width, within the limits of any incorporated village in the county, necessary to connect any public highway leading through the county," and may pass a by-law for the purpose of raising any money by toll on such bridge to defray the expenses of making and repairing the same.

9. Sub-section 3 of section 344 of said Act is amended by adding thereto after the words "Townships of the county," the words "Or any bridge required to be built or made across any river, over five hundred feet in width, within any incorporated village in the county, connecting any public highway leading through the county."

10. Sections 301 and 302 of the said Act shall apply to towns and incorporated villages as well as to cities; provided always that the right of appeal as provided by the said 301st section shall be to the judge of the county court.

11. Sub-section 2 of section 301 of said Act is amended by inserting the following words after the word "sidewalk," in the sixth line: "or any bridge forming part of the highway."

12. Section 302 of the said Act is amended by adding to the end thereof the following proviso:

"Provided also, that in cases where the council of any city or town shall decide to contribute at least half of the cost of such local improvement, it shall be lawful for the said council to assess and levy in manner provided by the 301st, 302nd, 303rd, 304th and 305th sections of this Act, from the owners of real property to be directly benefited thereby, the remaining portion of such cost without petition therefor, unless the majority of such owners representing at least one-half in value of such property shall, within one month after the publication of a notice of such proposed assessment in at least two newspapers published in such city or town, petition the council against such assessment."

18. Sub-section 12 of section 341 of said

Act is repealed, and the following substituted therefor:

"It shall be the duty of County Councils to erect and maintain bridges over rivers forming township or county boundary lines; and in the case of a bridge over a river forming a boundary line between a county and a city, such bridge shall be erected and maintained by the Councils of the county and city; and in case the Councils of such county or city, or the Councils of such counties, fail to agree on the respective portions of the expense to be borne by the several counties, or city and county, it shall be the duty of each Council to appoint arbitrators, as provided by this Act, to determine the amount to be so expended, and such award as may be made shall be final."

14. The following sub-section is added to section 280 of said Act:

"Whenever any stream or creek in any township is cleared of all logs, brush or other obstructions to the town line between such township and any adjoining township into which such stream or creek flows, the Council of the township in which the creek or stream has been cleared of obstructions may serve a notice in writing on the head of the Council of the adjoining township into which the stream or creek flows, requesting such Council to clear such stream or creek through their municipality; and it shall be the duty of such last named Council, within six months after the service of the notice as aforesaid, to enforce the removal of all obstructions in such creek or stream within their municipality to the satisfaction of any person whom the Council of the county in which the municipality whose Council received the notice is situate shall appoint to inspect the same."

15. Section 243 of the said Act is amended, by adding "or thirty duly qualified electors of any municipality" after the word "council" in the first line,

16. Any by-law which shall be carried by a majority of the duly qualified voters voting thereon, shall, within six weeks thereafter, be passed by the Council which submitted the same."

17. Section 27 of the said Act is repealed, and the following enacted in lieu thereof:

"In case of a township laid out by the Crown in territory forming no part of an incorporated county, the Lieutenant-Governor may, by proclamation, annex the township, or two or more of such townships, lying adjacent to one another to any adjacent incorporated county."

18. Section 153 of the said Act is amended by inserting after the word "aforesaid" in the first line, the following words: "as well as the assessment rolls, voters' lists, poll books, and other documents in the possession of or under the control of the clerk."

19. Sections 29 and 35 of chapter thirty of the Act passed by the Legislature of Ontario in the thirty-first year of Her Majesty's reign shall be and the same are hereby repealed.

MARRIAGE BY REPUTE—HOW TO DIFFER.

SELECTIONS.

MARRIAGE BY REPUTE.

The case of *Hill v. Hibbit* is sure to interest the public. It is full of incident, sensational, and highly spiced and has also some interest for the lawyer, we do not mean that any new principle is enunciated or any old principle developed, but the judgment of the Lord Chancellor in respect to the validity of the marriage of Eliza Phillips and James Hay brings into strong light the elementary doctrine of the English law of marriage.

The main facts are these: Hay met Phillips in London, and they cohabited; but, as the Lord Chancellor remarked, it is clear they were not married in England. They went to Scotland, where Hay introduced Phillips as his wife, and she was treated as his wife by the members of his family. Hay went to America. Phillips followed. In America Phillips used her maiden name, as it is alleged, for the purpose of earning her living. Phillips (said the Lord Chancellor) was plainly of unsound mind, and of a family subject of insanity; she was subject to fits, and, though perfectly sane for some time, liable to fly off at any moment. She was for some years in a lunatic asylum. Hay visited England, met Harriet Hibbit, cohabited with her for one night, subsequently met her in America, and was publicly married to her. Was this a valid marriage? Or was it interdicted by the connection between Hay and Phillips?

That there was a marriage according to the Scotch law there can be no doubt, because there was no mere repute, but there was also acknowledgment. Hay introduced the woman to his family as his wife, and she was received as his wife. This would appear to settle the case. No act of the man or of the woman can have the force of a divorce. A marriage by consent cannot be dissolved by consent. Yet it is true that in penal cases, such as bigamy, the prior marriage cannot be proved by mere repute. If Eliza Phillips had remained in a sound state of mind, the Lord Chancellor intimated that the case might have had a different complexion, because she would then have countenanced the idea that she had never been married. Certainly it would be a cruel hardship for a woman who is publicly married to find that her marriage is invalid, and her offspring bastards, because the man had years before lived in Scotland with some other woman as his wife, that woman having resumed the use of her maiden name. On the other hand, it is difficult to understand how a marriage by consent, being at law a valid marriage, can be dissolved by the acts of the man or woman, or by their joint assent. Divorce is extremely easy in some American States, but divorce by consent, without the intervention of a Court of Law, has not yet been admitted

anywhere. It is more difficult to establish a consensual marriage by mere repute than by repute and acknowledgment; but we apprehend that, the marriage being established, it is in law as binding and lasting as any other marriage.—*Law Journal*.

HOW TO DIFFER.

Judges differ, being fallible men; but they differ with great respect for the opinions of each other, being conscious of their own fallibility. Now and then, however, we suppose that even the judicial mind chafes at legal dogmas as advanced by other judges. Else how can we explain the brusque style in which the House of Lords overruled the Court of Exchequer Chamber in *Taylor v. The Chester Railway Company*, reported in the December number of the *Law Journal Reports*? In the Court of first instance, Lord Chief Baron Pollock and Barons Martin, Bramwell, and Pigott gave judgment unanimously in favour of the plaintiff. On appeal the Court of Exchequer Chamber reversed this decision. The majority consisted of Mr. Justice Keating, Mr. Justice Mellor, Mr. Justice Montague Smith, and Mr. Justice Lush; Mr. Justice Willes and Mr. Justice Blackburn dissented, and upheld the judgment of the Court below [36 Law J. Rep. (N.S.) Exch. 201]. This state of judicial opinions, which by the way is an apt illustration of the absurd constitution of the Exchequer Chamber—the minority of judges prevailing in the result—brought the case to the House of Lords in a condition very favourable to the appellant.

To read the report one would say, not exactly that the case came up with an immense amount of prejudice in favour of the appellant, but that at an early stage of the argument their Lordships had come to a conclusion, and to a very definite conclusion, on the question before them. The Lord Chancellor is a man of mild temper, and by no means possessed of an overweening belief in his own powers and ideas. Yet the Lord Chancellor knocked the majority of the Court below down like ninepins. Thus he said: "Can anyone conceive such a contest as that being raised? * * * Would such a contract ever be suggested or dreamt of? * * * I need not dwell upon the plain and obvious reasoning which is consonant in every way with good sense with regards to contracts. Nobody ever heard of a contract being a one-sided one. * * * I confess I have endeavoured to follow the judgment of the learned judges in the Court of Exchequer Chamber, from whom I have the misfortune to differ in this case. I cannot see any force in the reason which they there allege," &c. But all this is a trifle to the sledge-hammer style in which Lord Westbury expressed his dissent from the judges in the Court below. After stating the propositions put forward by the respondents, and sanction-

WRETCHED TRUSTEES—FRANCE, &c.

ed by that Court, his Lordship says:—"The whole thing is mere imagination about the agreement being *ultra vires*, and about the company committing a breach of trust. It proceeds only from a want of more accurately understanding the meaning of terms and the rules by which they are applied. Then to that must be added another extraordinary illusion." Then, after speaking of an argument drawn from the ultimate destination of certain money payable by the respondents, he says, "That is an utter confusion with respect to the provisions," &c., and again, "This is only another instance of misconception of the nature of the provisions applicable to this subject;" and his Lordship finished thus: "I regret that Sir C. Taylor has been put to the necessity of coming here to correct his misapprehension. This case is an extremely clear one, and I am clearly of opinion that the judgment of the Court of Exchequer Chamber must be reversed." Surely it was a very exceptional case which met with or deserved such crushing language from the Chamber of the Lords.—*Law Journal*.

WRETCHED TRUSTEES.

If you are a trustee, and you entertain a doubt as to the title of your alleged *cestuis que trust*, what ought you to do? Our student, fresh from the study of Mr. Lewin, would answer: "Pay the money into Court under the Trustee Relief Acts." This is a good answer so far as it goes. But suppose that your doubt or difficulty turns out to be an unreasonable one, you may be ordered to pay the costs of the payment into Court. How then are you, being an unlearned person, to find out whether your doubt or difficulty rests on a sound foundation, or is a creature of the merest imagination? The student will answer: "Take counsel's opinion." That reply, which on its face is wise and prudent, may lead the unlucky trustee into worse mischief. For here is the *dictum* of Vice-Chancellor Stuart in *Gunnell v. Whitear*, in the current number of our Reports:—"A trustee ought not to consult counsel as to the right of his *cestuis que trust*. If he has any reasonable difficulties and doubts as to their title, he should pay the trust money into Court under the Trustee Relief Acts. He is not to consult counsel as to the title of his *cestuis que trust*." Of course his Honour did not mean that such an act would be improper or indecorous, but that costs would not be allowed. But if the trustee is not to consult counsel, how is he to know whether his doubts are reasonable or not? We confess that this *reductio ad absurdum* fairly staggers us. The only possible solution is that, in the eye of equity, every trustee undertakes to bring to bear upon the duties of his office such an amount of legal knowledge and skill as will enable him to decide whether or no reasonable doubts do exist as to the rights of his *cestuis que trust*; and

if this rule is to prevail, we think it only fair that trustees should have distinct notice thereof. Perhaps the learned Vice-Chancellor had in his mind the celebrated case of *Jenkins v. Betham*, 15 C.B. 168, in which the Court of Common Pleas held that a person who holds himself out as a valuer of ecclesiastical property is bound to know, and to value according to the principle laid down in *Wise v. Metcalf*, 10 B. & C. 299. The analogy is not precise, because surveyors generally pursue a profitable calling, whereas trustees, like the victims of the ancient ordeal, walk among hot ploughshares, and very often stumble against them.—*Law Journal*.

France, like the Federal States, under the presidency of Lincoln during the civil war, is now governed by lawyers. According to the *Réveil* there are six barristers in the Government of National Defence, viz., Picard, Crémieux, Arago, Favre, Ferry, and Gambetta, and their four secretaries are of the same profession. Six of the ministers, nine of the higher ministerial officials, the police prefect and his general secretary, twenty-four of the commissioners despatched to the departments with extraordinary military and political powers, the whole of the newly-formed Council of State, the eight men at the head of the Paris Municipal Government, ten of the sanitary and food commissioners, six members of the War Department, six diplomatists, and five finance officials are also advocates.

All this is intelligible. The Paris bar is, and has been since 1789, republican to the backbone, and the party of the Left has throughout the Imperial *régime* looked for its champions among the great legal advocates. The system which has for its maxim, "Once a barrister always a barrister," has fostered this state of things to an extraordinary extent. The French barrister works under no obligation to uphold authority, and the temptations to resist it are to him many and powerful. Then, again, the bar must in all countries contain an exuberance of ambition. A barrister without ambition is an impossibility, and there are to be found in this class of men a host of persons strong in head, tongue, and heart, and these are the persons who naturally come to the front in critical times. In addition to these considerations, it is obvious that the bar affords exceptional opportunities of exhibiting talent; and however clever a man may be, he does not get into power unless his countrymen have means of detecting his ability. Whether the bar of Paris will gain in public repute by its present position is another matter. Marvellous as are the energy and the pluck of M. Gambetta, his treatment of the French generals is likely to form a complete set-off to his virtues. It is not our business to go into this question. It is enough to point to the phenomenon of France being entirely ruled by the bar.—*Exchange*.

C. L. Cham.]

TOWNSHIP OF WALSINGHAM v. LONG POINT Co.

[C. L. Cham.]

At the Leeds Assizes, a witness, in a case before Mr. Justice Byles, was inaudible, which is not a very uncommon incident. The witness had a beard and moustache. The judge said:—

“An ornament is now generally worn by gentlemen which certainly much impedes the voice. (His Lordship glanced round the barristers’ table, where several flowing beards were conspicuous.) But I would rather restrain what I was going to say. I was not aware; but I hope no gentleman will take my observation as intended for him. I do not mean it, I assure you. But what I said as to the hirsute ornament is the result of long observation.”

His Lordship could not refer to a profusion of whiskers, for which the bar of England has long been famous, or to beards, which certainly cannot affect the voice. The hirsute ornament denounced by the learned judge must be the moustache. We are surprised at his Lordship’s dictum. In Parliament, in Courts of justice, on the platform, and even in the pulpit, speakers wear moustachios, and we have never observed that the hirsute ornament was an impediment to speech. On the contrary, we were under the impression that, by protecting the throat and lungs, it promoted clearness and strength of utterance. Perhaps Mr. Justice Byles was only indulging in good-natured banter about the hirsute ornament which our fathers thought was given by nature for the purpose of enabling razor-makers and barbers to gain an honest living.—*Exchange*.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law.)

THE TOWNSHIP OF WALSINGHAM v. THE LONG POINT COMPANY.

Assessment—Appeal—Statute labour.

An island forming part of a municipality, but situated in no road division, and deriving no benefit from the roads of the municipality, having been assessed for statute labour, the owners appealed to the County Judge on the grounds of over assessment, and that the property was not liable to statute labour.

On an application to restrain proceedings before the Judge, *Held*, that though a County Judge has authority to increase or reduce an assessment, or to rectify errors in or omissions from the roll, the question of liability for statute labour is beyond his jurisdiction. A writ of prohibition was accordingly granted.

[Chambers, Nov. 24th, 1870—*Galt, J.*]

A summons was obtained on behalf of the Township of Walsingham calling upon the Long Point Company, and the judge of the County Court of the County of Norfolk, to shew cause why a writ of prohibition should not issue, prohibiting and restraining the said judge and the said company from proceeding before the said judge in the matter of an appeal by the said company from the Court of Revision for the Township of Walsingham, so far as the said

appeal relates to statute labour, and the liability of said company to perform statute labour in road division No. 4 in said township: on the ground that the said judge had not and has not any jurisdiction to entertain such appeal, so far as the same relates to statute labour.

By a resolution passed by the Municipal Council of Walsingham, on the 21st February, 1870, it was resolved that road division No. 4 should be held to include the whole of Long Point, and that all persons, either resident or non-resident on said Long Point, liable to perform statute labour, should perform the same in said road division No. 4 unless commuted for in money, in which case the proceeds thereof should be expended in the said division No. 4, until otherwise ordered by the Council. The Long Point herein mentioned was the property of the Long Point Company, and it appeared from the papers filed on this application that this was the first time that the property in question was included in any road division or assessed for statute labour. In making up the assessment roll for this year, the assessors served a notice of assessment, stating the number of acres to be 14,800, the value to be \$8,500, and the number of days of statute labour 80, in accordance with the rate established by sec. 88 of 82 Vic., ch. 36.

From this assessment the company appealed to the Court of Revision, who dismissed the appeal, and thereupon the company appealed against the decision of the Court of Revision to the judge of the County Court on the following grounds:—

1. That the property of the said Long Point Company is not liable for the performance of statute labour on the grounds that it is in no road division in the said township, and that no roads are within a reasonable distance thereof, upon which statute labour can be performed, and that the assessment of the same for statute labour is contrary to law.

2. That the property of the said Long Point Company is over-assessed, and at a higher proportionate rate than other property in the said township of Walsingham.

3. That the assessment of the said company’s property is excessive, and improper, and unlawful.

4. That the proceedings of the said Court of Revision were unlawful and imperfect.

This appeal was heard by the learned Judge on the 20th of June, and on the 9th of July he gave judgment reducing the assessed value of the lands of the company to \$7,000, and directing that the statute labour assessed against the lands of the company should be struck out, and the assessment roll of the said township amended accordingly. This judgment was as follows:—

The matter of appeal may be substantially divided into two heads.

1st. Our assessment on the value of the property.

2nd. The liability of the property of the company as situated to be assessed for statute labour.

As to the first point, it appears from the evidence that the property of the company was assessed for \$5,200 in 1868, that being the first year of their ownership. In the following

C. L. Cham.]

TOWNSHIP. OF WALSINGHAM V. LONG POINT Co.

[C. L. Cham.]

year it was raised to \$7,000, when a general increase was made in the assessed value of all the property in the township. This year. (1870), it is again sought to be raised to \$8,500, although the evidence shows that no general increase has been made in the assessed value of the property in the municipality, but if anything, rather a decrease. It seems that the ground is kept as a shooting and trapping preserve, where game and fur are protected, and that it is unremunerative to the proprietors in a pecuniary point of view, costing them more yearly than the revenue derived from it.

From the evidence of value and other matters proved, I am satisfied that \$7,000 is the full assessable value of the said property, and I therefore reverse the decision of the Court of Revision upon that point, and decide, and direct, that the said property shall be assessed for the sum of \$7,000, and no more, and that the assessment roll of the township be amended accordingly.

As to the second point, I find that the property of the Company consists of an island composed of land and marshes, the nearest part of which is three or four miles, and the farthest part twenty-five miles from the road division in which the council has placed it. I find that no roads built over the main land would be of any service, value or benefit to the property of the company. It does not, therefore, seem reasonable or just that the property should be laid under a burthen, which will, under no circumstances, produce a benefit to them; and upon examining the Assessment Act, and the Municipal Institutions Act, while I find that power is given to municipal councils to divide the municipality into road divisions, I also find that every resident shall have the right to perform his whole "statute labour, in the statute labour division in which his residence is situated, unless otherwise ordered by the municipal council," (see sec. 89), and also, "in all cases, when the statute labour of a non-resident is paid in money, the municipal council shall order the same to be expended in the statute labour division, where the property is situated, or where the said statute labour tax is levied," (see sec. 88). It seems to me, therefore, that the council, though they have the power to regulate and make the road divisions, must exercise such power in a reasonable manner, and that it would be unjust and absurd to contend that they have the power to order a man to come twenty-five miles to perform his statute labour, or that they can so make road divisions, that property can be taxed for roads which cannot by any possibility be of any service, value or benefit to the property. Such contention is certainly unreasonable, and it appears to me totally at variance with the spirit and intention of the Assessment Act.

I therefore reverse the decision of the Court of Revision on the second point also, and direct that the statute labour assessed against the lands of the said company, be struck out, and the assessment roll of the said township, amended accordingly. And I direct the respondents to pay the costs of this appeal.

GALT, J.—There is no question as to the jurisdiction of the learned Judge to reduce the

amount of the assessed value of the lands, but the point raised on the present application is whether he had any jurisdiction to entertain the question as to the liability of the company to statute labour. It is to be observed that the dispute was not as the number of days statute labour assessed for. That is regulated by the 83rd section, and is a mere matter of computation on the assessed value of the property: but the point in dispute was the liability to perform statute labour at all, and this in my opinion is not the subject of appeal, either to the Court of Revision or from their decision. Section 60 of the Assessment Act of 1869 regulates the proceedings for the trial of complaints; sub-section 1 is as follows:—"Any person complaining of an error or omission in regard to himself, or having been wrongfully inserted on or omitted from the roll, or as having been undercharged or overcharged by the assessors in the roll, may personally, or by his agent, within fourteen days after the time fixed for the return of the roll, give notice in writing to the clerk of the municipality, that he considers himself aggrieved for any or all of the causes aforesaid." Sub-section 2 is: "If a municipal elector thinks that any person has been assessed too low or too high, or has been wrongfully inserted on or omitted from the roll, the clerk shall, on his request in writing, give notice to such persons and to the assessor, of the time when the matter will be tried by the court, and the matter shall be decided in the same manner as complaints by a person assessed." These are the only sub-sections to which it is necessary to refer in considering this question, and from these it appears to me that the subject matters of complaint are confined to overcharge and undercharge as respects value, and the entry or omission of a person on the roll. These then are the only matters from a decision upon which an appeal lies to the County Judge. There can be no appeal as regards the question of statute labor as a separate and distinct complaint for the reason already given, namely, that the amount of statute labour is regulated by the assessed value of the property by section 83. I am, therefore, of opinion that the learned Judge had no jurisdiction to decide the question as to whether the company were properly entered on the assessment roll as liable for statute labour. By section 332 of the Municipal Act of 1866, authority is given to township councils to pass by-laws "For regulating the manner and the division in which statute labour or commutation money shall be performed and expended," and if such by-law is unjust or improper, steps should be taken to have it quashed. The municipal council of the township of Walsingham did by the resolution of the 21st of February, 1870, regulate the manner and the division in which statute labour as regards the land in question should be performed, and while that resolution remains in force, I do not see that either the Court of Revision or the Judge of the County Court has any power to amend the roll by striking out the statute labour.

Let the writ issue as regards the statute labour.

Prohibition granted.

C. L. Cham.]

MCKINNON v. VAN EVERY.

[C. L. Cham.]

MCKINNON v. VAN EVERY.

Contract with Indian—Interpretation of Statutes—Repealing acts.

A debt contracted by an Indian while Con. Stat. Can. cap. 9 was in force, cannot now be sued for under 32 33 Vic. cap. 6.

[Chambers, Dec. 10, 1870—Galt, J.]

This was a summons, calling upon the plaintiff and the Judge of the County Court of the County of Haldimand, to show cause why a writ of prohibition should not issue to restrain any further proceedings on a plaint brought in the First Division Court of the County of Haldimand to recover a debt contracted (while the Con. Stat. Can., cap. 9, was in force) by the defendant, who was admitted to be an Indian, within the provisions of that statute (now repealed), and of 32 33 Vic. ch. 6.

—shewed cause, citing *Ellis v. Watt*, 8 C. B., 614; *Zohrab v. Smith*, 5 D. & L., 635.

Harrison, Q.C., supported the summons, and cited 13 14 Vic., ch. 74, sec. 53; C. S. Can., cap. 9; 31 Vic., cap. 42; sub secs. 14, 33, 32; 32 Vic., ch. 66, sec. 23; *Jaques v. Withy*, 1 H. B. 65; *Hitchcock v. Way*, 6 A. & E. 943; *Rez v. McKenzie, R. & R., C. C.*, 429.

GALT, J.—It is admitted by the learned Judge in his very clear argument in this case, to which I am much indebted not only for a statement of the facts, but for a reference to the authorities, that so long as Con. Stat. Can., cap. 9, was in force, this suit could not have been maintained, but he is of opinion that the repeal of that statute has the effect contended for by the plaintiff.

The 2nd section was—"No person shall take any confession of judgment or warrant of attorney from any Indian within Upper Canada, or by means thereof, or otherwise however obtain any judgment for any debt or pretended debt unless" etc., referring to circumstances which it is not pretended exist in the present case. It is contended that, although when this debt was contracted there was no remedy for its recovery, yet that now a judgment may be obtained by reason of the repealing statute.

The learned Judge, in his argument, says:—"As to the objections founded on the statute relative to Indians, the case of *Jaques v. Withy*, 1 H. B. 65, cited on behalf of the defendant, decides that a debt declared illegal by a repealed Act, and contracted during its operation is not legalized by its repeal. *Hitchcock v. Way*, 6 A. & E. 943, also cited, decides that the law as it existed when the action was commenced must decide the right of the parties unless the legislature express a clear opinion otherwise. If the debt contracted in this case had been prohibited by the statute then in force it is probable that it would have been within the decision referred to, and that the present cause of action being founded on an illegal consideration might have been avoided on this ground, but by Con. Stat. Can., cap. 9, the remedy only was prohibited, and not the debt, and the prohibition being removed, as I think it has been for reasons hereinafter stated, the debt remains subject only to the provisions of statute now in force. See *Surtees v. Ellison*, 9 B. C. 752."

With every respect for the opinion of the learned Judge, I am obliged to say that I differ

from him in the construction to be put on the cases of *Hitchcock v. Way* and *Surtees v. Ellison*. The former was an action against the acceptor of a bill of exchange by a *bond fide* holder, brought to issue before the passing of Stat. 5 and 6 Wm. 4, ch. 41, but tried afterwards. It was held that the defendant might avail himself of statute 9 Anne ch. 14, and was entitled to non-suit if he proved the bill to have been given for a gaming consideration. When the law is altered by statute pending an action, the law as it existed when the action was commenced must decide the rights of the parties unless the legislature by the language used shew a clear intention to vary the mutual relation of such parties. The matter in dispute, it will be observed, in that case was whether an Act of Parliament, passed after a suit has been commenced, would without express words deprive a defendant of a defence which he was entitled to urge but for the passing of the Act, and it was held it would not.

In the present instance the plaintiff insists that although when this debt was contracted there was a positive prohibition against his obtaining a judgment against this defendant, the repeal of that enactment enabled him to do so now, although there are no words used which would show that such was the intention of the legislature. I must say that the above case appears to me to establish the contrary doctrine. It is true that Lord Denman, in giving judgment, refers to the commencement of the suit as determining the rights of the parties, but it must be borne in mind that this was said as regarded pleadings, not as respected the right of action, and it would be singular if no remedy existed when the debt was contracted, and in fact where such remedy was actually prohibited, that the repeal of such prohibition should have an *ex post facto* operation, and enable the plaintiff to obtain a judgment for a debt contracted during the existence of the prohibition.

It is not necessary for the decision of this case to express an opinion as to what the rights of parties giving credit to Indians are under the present law, but I think it very doubtful whether even now a judgment can be obtained against an Indian. The case of *Surtees v. Ellison*, *ubi sup.* appears to me decisive against the plaintiff. It was an action brought by the assignees of a bankrupt against the sheriff of Durham. At the trial it appeared that before and in the year 1823 the bankrupt had carried on business as a seed merchant, and during that period had contracted a debt of £100 to the petitioning creditor, but he had not actually carried on business after that time. In 1826 the 6 Geo. IV. cap. 16 was passed, repealing the laws previously in force relating to bankrupts. In 1827 the bankrupt committed an act of bankruptcy by keeping house, and a few days afterwards the sheriff made the seizure complained of. For the defendant it was contended that the commission could not be supported, inasmuch as there was no trading after 6 Geo. IV. cap. 16 was passed. In giving judgment on the rule to enter a nonsuit, Lord Tenterden, C. J., says: "The rule for entering a nonsuit in this case must be made absolute. It has been long established that when an act of Parliament is repealed, it must be considered (except as to transactions passed and closed) as

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if it had never existed." The other members of the court concurred in this view.

Now, apply that case to the present. There had been no trading since the passing of the 6 Geo. IV. in the one case, nor after the passing of the 31 Vic. in the other; the transactions in both were passed and closed, and could not therefore be affected by any subsequent legislation, unless such an intention was plainly expressed. To give effect to the contention of the plaintiff in this case, I must be prepared to hold that although up to the date of cap. 6 of 32 & 33 Vic. (1869,) no judgment could have been obtained against this defendant, yet that the passing of that statute shall leave not only the present defendant but every Indian in this Province liable for debts contracted during a course of years during which the legislature had most distinctly prohibited persons like the plaintiff from obtaining judgments against them. In my opinion the learned judge had no authority to direct a judgment to be entered in this case, and that the prohibition should issue.

Prohibition granted.

NEW BRUNSWICK.

SUPREME COURT.

BURKE v. NILES.

A lot of land was described in a grant as "beginning a stake standing on the bank or edge of Round Lake, thence," &c. (describing three lines of the lot), "to a stake standing on the westerly bank or edge of the said lake, and thence following the several courses of the said bank or edge to the place of beginning."

Held, 1st. That the title under the grant extended to the margin of the lake, and was not limited by a stake standing on the bank. 2nd. That the grantee was entitled to land formed in front of the lots by the gradual receding of the waters of the lake.

Under a grant of a "lake," reserving to the grantor all mines and minerals, the soil of the lake passes.

Trespass for breaking and entering the plaintiff's close and carrying away grass, with a count for assault and battery. The defendant pleaded not guilty, with a plea of justification of the assault in defence of his property.

It appeared at the trial that the plaintiff was the owner of lot No. 2, in a grant from the Crown to Joseph Burke and others, dated 28th April, 1828, in which the land was described as follows: "Beginning at a stake standing on the bank or edge of Round Lake, (so called), the said stake being distant 53 chains from a marked spruce tree standing on the rear or south-easterly line of the grant to John Downing and associates; thence north 15 degrees west. &c., (stating several courses); thence south 75 degrees east, 110 chains to a stake standing on the westerly bank or edge of the said lake, and thence following the several courses of the said bank or edge in a northerly direction to the place of beginning; and also particularly described and marked out on the plan of survey hereto annexed." Round Lake was about half a mile wide, and navigable for boats.

The defendant claimed under a grant from the Crown, dated 10th March, 1851, in the following words: "All that certain lake in the parish of Botsford, distinguished as Round Lake, contain-

ing 245 acres, together with all profits, hereditaments, &c., thereunto belonging or appertaining, except and reserving nevertheless to us, our heirs successors, all coals, and also all gold and silver, and other mines and minerals."

After the defendant obtained the grant, he commenced to drain the lake, and reduced the depth of the waters about five feet, at the rate of about a foot a year, according to his evidence. The grass, for the taking of which the action had been brought, had been cut by the plaintiff on the shore of the lake between the top of the bank where the high land commenced, and the water; and the assault was committed by the defendant in driving the plaintiff off this piece of land where the grass was cut. The defendant contended that the plaintiff's grant was bounded by the top of the bank; also that the land where the grass was cut had been part of the bed of the lake which he had gained by drainage, and consequently that it belonged to him by his grant. The judge directed the jury that the plaintiff's grant was not limited to the top of the bank, but extended to the water of the lake, and that if the water receded gradually and imperceptibly, the land so left dry would belong to the plaintiff; though it would be otherwise if the reliction was visible and sudden, caused by the defendant's drainage; and he left it to them to find whether the place where the grass was cut had been dry land when the defendant's grant issued, or whether it had become so since by his drainage—directing them in the former case to find a verdict for the plaintiff for taking the grass. The jury being unable to agree on the question submitted to them, the judge then directed them to find for the plaintiff for the trespass, having doubts whether the defendant's grant gave him any interest in the soil of the lake. He also directed a verdict for the plaintiff on the count for the assault which was not justified, whether the *locus in quo* belonged to the defendant or not. The jury found a verdict accordingly; and a rule nisi for a new trial having been granted on the ground of misdirection,

J. J. Fraser shewed cause.—He contended, 1st. That the plaintiff's grant extended to the centre of the lake, or, at all events, that as he and the parties under whom he claimed had used the land between the top of the bank and the edge of the water for twenty years, it could not be taken from him by a subsequent grantee of the Crown without an inquest of office. 2nd. That the plaintiff was entitled to the accretion formed by the receding of the lake—the same rule applied as in case of a river. 3d. That the defendant's grant gave him no interest in the land; that the grant of a river *eo nomine* did not convey the soil, but only a right to use the water: Co. Lit. 4 b; 14 Vin. Abr. 92; Bac. Abr. Grant (1) 8; Woolrych on Waters 151; Angell on Watercourses, secs. 5, 41, 42, 52, 54; 2 Wash. on Real Prop. 524, 632.

A. L. Palmer, contra, contended, 1st. That the plaintiff's land did not extend beyond the bank of the lake; 2nd. If it did, the accretion was not gradual and imperceptible, and consequently that the *locus in quo* did not belong to the plaintiff; 3d. That the grant to the defendant conveyed the soil. A grant of *stagnum* conveyed both the water and the soil: Cruise's Dig. Deed,

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ch. 21, sec. 49; 4 Bac. Abr. 85; Angell on Watercourses, secs. 44, 56, 57, 157, 158. The exception of the "mines and minerals" showed that it was the intention of the Crown to grant the soil.

RITCHIE, C. J., delivered the judgment of the court (after stating the grants under which the parties claimed)—The principal questions arising in this case are: 1st. Whether the plaintiff's grant extends to the margin of the lake, or was limited to the stake described as standing on the bank? 2nd. Whether the plaintiff, as the riparian proprietor, was entitled to any accretion from the lake in front of his own land? and 3rd. Whether the grant to the defendant conveyed the soil of the lake or merely the water?

In Angell on Watercourses, sec. 26, it is said: "If a boundary is described as running to a monument standing on the bank, and from thence running 'by the river,' or 'along the river,' it does not restrict the grant to the bank of the stream; for the monument in such case is only referred to as giving the direction of the line to the river, and not as restricting the boundary on the river." And in *Robinson v. White*, 42 Me. 218, it is said that although the monuments are described as standing on the margin or bank of the stream, the grant carries the title of the grantee to the centre of the river, unless its terms clearly denote an intention to stop at the margin. The same principle is applicable here as to highways. Thus it has been held, that where a piece of land adjoining a highway, is conveyed by general words, the presumption of law is, that the soil of the highway, *usque ad medium flum*, passes by the conveyance, even though there is a plan annexed which would appear to exclude it: *Berridge v. Ward*, 10 C. B., N. S. 400; *Lord v. Commissioners of Sydney*, 12 Moo. P. C. 497. See also *Reg. v. The Board of Works, Strand*, 4 B. & S. 526. We think the intention of the Crown was, that the lake should be one of the boundaries of the plaintiff's grant, and that the words "bank or edge" were intended to express the same thing, and that they mean the margin of the lake—thus extending the grant down to the water's edge, and not leaving a strip of ungranted land or beach between the margin of the lake and the top of the bank where the highland commenced. The words "edge" and "margin" are synonymous terms, and therefore we think the words of the grant cannot be satisfied unless it is extended to the margin of the lake.

This involves another question—whether the plaintiff's grant is limited to the margin of the lake as it existed at the date of the grant, or whether it will also include any land formed in front by gradual and imperceptible accretion? In Angell on Watercourses, sec. 59, it is said that "if a navigable lake recede gradually and insensibly, the derelict land belongs to the adjacent riparian proprietors." The learned judge's direction to the jury was in accordance with that rule.

Then as to the effect of the defendant's grant. Whatever doubt, if any, there might be as to what would be conveyed by the word "lake" in a grant, the subsequent words of the grant in this case, whereby the mines and minerals are excepted, evidence a clear intention, on the part

of the Crown, to convey the soil of the lake to the defendant.

Whether the place where the assault was committed was the defendant's land or not, the assault, or at least a part of it, was entirely unjustified according to the defendant's own account of it; therefore the plaintiff would be entitled to retain the verdict for the damages assessed on the third count; but unless he consents to confine the verdict to that count, we think there ought to be a new trial.—*American Law Register*.

ENGLISH REPORTS.

COMMON PLEAS.

BECHERVAISE v. THE GREAT WESTERN RAILWAY COMPANY.

Practice—Interrogatories—17 & 18 Vict. c. 125, s. 51.

In an action against a railway company to recover damages for personal injuries sustained by a passenger in consequence of an accident occurring to the train in which he was travelling, the Court disallowed interrogatories, asking the defendants whether what the train had come into collision with, was under their care; the application for leave to administer the interrogatories being made before declaration, and without any special affidavit showing the necessary relevancy of the information sought.

[19 W. R. 229.]

The plaintiff, before declaring, applied to Byles, J., at chambers, for leave to administer interrogatories to the defendants, on an affidavit which simply stated that he sued to recover damages for injuries sustained while travelling on the defendants' railway, through the negligence of the defendants' servants. Byles, J., allowed part of the interrogatories only.

Michael now moved to vary the order of Byles, J., by rescinding so much of it as disallowed the interrogatories in question, on the following affidavit of the plaintiff:—

1. "On Nov. 25, 1869, being at Great Malvern, I paid the fare to an official of the Great Western Railway Company for, and obtained a ticket entitling me to travel as a third-class passenger from Great Malvern to New Milford, in the county of Pembroke.

2. "I took my seat in a third-class railway carriage, forming part of a train belonging to the Great Western Railway Company, and which left Great Malvern at or about 6.34 in the evening.

3. "The train, proceeding on its way, arrived at Hereford at or about 7.20 p. m.

4. "The train left Hereford at about half-past seven p. m., and, shortly after leaving the station at Hereford, came into violent collision with something; but, owing to the darkness of the evening and great confusion prevailed, I was and am totally unable to state what it was the train came into collision with.

"I am advised and believe I shall obtain material benefit in this cause by ascertaining by means of interrogatories with what the train so came into collision."

The interrogatories sought to be administered were as follows:—

1. "Were the defendants on the 25th November, 1867, carriers of passengers, and as such did they profess to carry, or were they in the

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practice of carrying passengers from Great Malvern Station to the New Milford Station?

2. "Did a train of the defendants on the 25th of November, 1869, leave the said Great Malvern Station to go the New Milford Station, at or after 6.34 p.m., by which a passenger whom the defendants as carriers of passengers had agreed to carry to New Milford Station might start on his journey from Great Malvern Station to New Milford Station, and if no such train started at 6.34., at what time on that day, after that hour did the first train leave Great Malvern Station by which such passenger could start as aforesaid on the said journey?"

3. "If a passenger started from Great Malvern Station by that train, would he have been carried by the defendants to Hereford on the said journey to New Milford Station, and, if yea, by what train would he have been carried by the defendants on his said journey from Hereford towards New Milford Station, if he proceeded onward from Hereford as soon as practicable?"

4. "Did any collision or other and what accident occur to the last mentioned train, on this said journey from Hereford, shortly after it left the defendants' Hereford Station, and before it reached any other station of the defendants?"

5. "If you say that there was a collision, what was it that the said train in which the plaintiff was a passenger came into collision with? Were the defendants possessed thereof? Was it under the care of themselves, or one or more of their servants? Was it on the same rails with the same train? Was it standing still, or moving? If moving, was it moving towards Hereford, or in the opposite direction? How came it to be on the rails there? If there was any other cause of the collision, or other accident beyond what you have stated, what was it?"

6. "Was or were any person or any persons injured in the said accident? If yea, what are their names and addresses?"

7. "Was the railway at Great Malvern on the 25th of November, 1869, the defendants' railway? Was it then worked by the defendants, or by the defendants and any other and what company?"

8. "Have the defendants ever had in their possession or control any and what report, or reports, letter, or letters, writing or writings, memorandum, or memoranda, entry, or entries, receipt, or receipts, document, or documents, relating to the matters in dispute in this action, or any of them? If yea, which of them are now in the defendants' possession or control? And have the defendants any, and what, objection to produce any, and which, of them? And what do you know as to the possession or control of the others of them since they were last in in the defendant's possession or control? If any of them have been lost or destroyed what do you know of their contents so far as they relate to the matters in dispute?"

The interrogatories which had been disallowed were the 5th (with the exception of the first sentence ending "collision with"), the 6th, and the 7th.

The following cases were referred to:—*Atkinson v. Fosbrooke*, 14 W. R. 832, 35 L. J. Q. B. 182, L. R. 1 Q. B. 628; *Bayley v. Griffiths*, 10 W. R. 798, 31 L. J. Ex. 477.

WILLIS, J.—It is not enough for a party applying for leave to interrogate to show that the matter of the interrogatories is relevant to some possible issue in the cause. In framing the second Common Law Procedure Act the practice of the Court of Chancery was purposely avoided; and the discretion of the judge was interposed for the sake of avoiding costs. It is for the judge to determine at what stage of the cause discovery should be allowed. The discovery of a matter which is relevant when issue has been joined might be sought at an earlier period for heaping up expenses against the other party, and especially might this be the case in actions against railway companies. The judge at chambers therefore, must look closely at the circumstances under which the application for interrogatories is made, and see that they are not sought to be administered for the purpose of making or increasing costs. Here, when the plea has been delivered, it will probably be seen what is the nature of the case; but at present there is no affidavit before us showing that the information asked for must be relevant. If we were to do what we are now asked, a judge at chambers would in all cases feel himself bound to admit interrogatories against a railway company on the common affidavit. I think Byles, J., exercised a wise discretion.

BYLES and KEATING, J. J., concurred.

Rule refused.

EXCHEQUER CHAMBER.

(Appeal from the Common Pleas.)

SMITH V. THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Railway company—Negligence—Evidence for jury.

A railway company's servants, having cut the grass on the banks of the line, left it there fourteen days during extremely hot and dry weather. Soon after the passing of a train a fire broke out in one of the heaps of cut grass; it then extended up the bank to the hedge, and from the hedge to a stubble field, across the stubble field and an intervening road to the plaintiff's cottage. An unusually high wind was blowing at the time. The cottage was situated 500 yards from where the fire broke out.

Held (confirming the decision of the Common Pleas), that there was evidence of negligence (*BLACKBURN, J. dubitante*), and that if there was negligence it was no answer for the company to say that the damage was greater than could be anticipated.

[19 W. R. 230.]

This was an appeal brought by the defendant against the decision of the Court of Common Pleas, discharging a rule obtained by him to set aside the verdict for the plaintiff, on the ground that there was in evidence to go to the jury of any liability on the part of the defendant.

The pleadings and facts, together with the cases cited, are more fully set out in 18 W. R. 343.

The declaration stated that, by the negligence of the company in the management of their engines, and by heaping hedge trimmings on the banks, a fire was occasioned, which destroyed the plaintiff's cottages.

At the trial it was proved that next to the company's line of rails there was a green bank; that a hedge separated this bank from a stubble

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field; that the plaintiff's cottages were situated across the field, 200 yards from the line, and were separated from the field by a lane; that the company's servants had the trimmings the hedges along the line, and the tufts of grass of the banks and the trimmings had been left lying on the banks for a fortnight. The weather had been exceptionally hot and dry for some time, so that the little heaps became highly inflammable. About a quarter to one workmen were seen sitting on the bank, near the spot where the fire broke, but on the opposite side of the line, eating their dinner, and one of them was smoking a pipe. Shortly after a train was seen to pass; a fire broke out on, or close to, one of these heaps on the bank; it spread in two directions; the workmen and others succeeded in putting it out in one direction, but a high wind blowing at the time, the fire burnt through the hedge into the field, then ran up the stubble field across the road to the cottages, which were 500 yards from the place where the fire broke out, in spite of the exertions of the workmen. The cottages were destroyed.

The plaintiff did not call the company's servants as witnesses.

At the close of the plaintiff's case, it was submitted there was no evidences to go to the jury.

A verdict was taken by consent for £80, leave to move being allowed to the defendant.

Kingdon, Q. C. (*March* with him), for the appellants (defendants below).—There is no evidence to show that the fire originated in the heaps, or that it was caused by sparks from the engine which passed a few minutes before. Some men had been seen near the shortly before, and about half an hour previous one of them was smoking a pipe on the bank. The plaintiff might have called these men, but refused to do so. The fire might have been caused by a passenger throwing a fusee out of the carriage window. There is no evidence at what point the fire broke out. The bank itself was in a proper condition, the grass having been cut about three weeks previously. If, therefore, the fire originated in the short grass, on account of the unusual dryness of the season, and the extraordinary high wind blowing it to the plaintiff's house, there was no negligence. [*BRAMWELL, B.*—If, to suit the company's convenience, the heaps were left on the bank, and the plaintiff was injured by it, why should not the company pay? If the company had spread gravel over the grass, the fire could not have happened. They had sufficient notice to have taken proper precautions.]

Cole, Q. C.—If there was any evidence at all of negligence, the verdict is good.

KELLY, C. B.—I had some doubt at first, but on careful consideration of the facts I cannot but feel that there was evidence of negligence by the company to go to the jury, and evidence of negligence which was the cause of injury. It appears that soon after a train had passed the spot in question, which was drawn by an engine emitting sparks, a fire broke out on the adjacent land. It was a very dry season, and the defendants had cut the grass on the banks of the railway about a fortnight before, probably with a view to prevent fires taking place. Besides that, the company had trimmed the hedge which

separated the railway bank from a field. The trimmings and cut grass, which were called rummage, were placed in little heaps on the railway bank, and had been lying there during a fortnight preceding the fire. On the other side of the hedge was a stubble field, which was also in a very inflammable state, on account of the dryness of the weather. Shortly after a train passing, a fire broke out at, or near, one of these heaps. It ran up the bank, burnt the hedge, ran across a stubble field, and reached the plaintiff's property, which was 500 yards from the spot where the fire broke out, and 200 yards from the railway in the most direct line. There is no distinct evidence what was the cause of the fire, or what took place immediately it occurred, for the persons who might have known how it originated were not called. But there was no doubt that it originated on the railway bank, and ran across the stubble field, and destroyed the plaintiff's property. Now, the only question is, if there was any evidence of negligence to go to the jury, or on which, if they had returned a verdict, it would have been sustained. If the jury had proved that the fire had originated in the heaps, which had been caused by sparks coming from the engine and blown on to the heaps by the high wind at the time, and then spread to the plaintiff's property in the way described, could that verdict have been sustained? I think there was evidence that it originated in the heaps, and if that were so, the defendants are responsible. The defendants were bound to remove the heaps, knowing that the summer was exceptionally hot; knowing that engines passed along their lines, which they could not prevent emitting sparks; and knowing that there was nothing more probable than that sparks might fall on the grass and the heaps, and set fire to them; and that such a fire might be communicated to the adjoining property. Having cut the hedge and grass, probably with the intention of preventing fires, I think they were guilty of negligence in not removing the trimmings when cut, for it might have been foreseen that it was probable that when the heaps caught fire it might spread to the stubble field. As to the observation made by Justice Brett, that no person would reasonably anticipate that there would be an unusually high wind, so that the fire would run from the materials on the banks for some hundred yards across a stubble field and lane, I quite agree with that; but that is not the true test of the defendant's liability.

But I think the law is, as they were aware that the heaps had been lying on the ground during an exceptionally hot and dry summer, and it was probable that the engines which emitted sparks would set them on fire, they were bound to protect the neighbouring property against the consequences of such probable fire, and that they were therefore bound to remove the cuttings as soon as the hedge was cut; and as they did not do so they are liable for all the natural consequences from the cuttings catching fire. The mere accident of the plaintiff's house being situated 500 yards distance from where the fire occurred does not alter the company's liability.

MARTIN, B.—I am of the same opinion, there was evidence of negligence to go to the jury.

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[His Lordship, after stating the facts, said—] Had the fire come to the plaintiff's house through the negligence of the defendants? I think it had. There were heaps of dry rummage on the bank: directly after one of the company's engines passed, which emitted sparks, the heaps were on fire, and the fire spread to the plaintiff's house. There is, therefore, evidence that the fire originated in that way. The circumstance of the house being distant 500 yards has nothing to do with that. I consider that the sparks falling on the heap was the cause of the fire.

CHANNEL, B.—The only question here is whether there was any evidence to show that the fire originated from a spark falling on the heaps. I think there was. As I think that is so, it is no excuse for the company to say that the damage was greater than they anticipated.

BLACKBURN, J.—I agree with the judgment of Channell, B. If I alone had to decide this matter I should require before giving judgment to have some doubts removed. I think, however, that there was evidence to go to the jury. I guard myself however from saying that such a verdict might not be set aside, since, in the case of *Vaughan v. Taff Vale Railway Company*, 8 W. R. 649, it was decided that a railway company are not responsible for an accidental fire caused by a spark falling from one of their engines upon premises adjoining the railway, if they have taken every precaution that science has suggested to prevent injury. But it was held that they were liable if they were guilty of some negligence in fact. But negligence cannot be implied from the mere employment of locomotive engines, as the use of them is permitted by the Legislature.

I agree entirely with that, and that the company has a duty cast on them to use all reasonable care to prevent any fire arising from the use of the engines. But is there any evidence here that the company unintentionally omitted to do that which a reasonable person would have done? To answer that question, we must look at what a reasonable man might anticipate or expect. Could any man giving a reasonable consideration as would regulate reasonable men under the circumstances, have anticipated that the fire would have spread beyond the fence. I have no doubt that if a railway company were to strew the banks with dry grass in a highly inflammable condition, and that there was no boundary to their property, by wall or otherwise, and that a spark from an engine set the grass on fire, and that highly inflammable property was situated next to their property, and that the fire destroyed the neighbouring property, that the company would be guilty of negligence. My doubt, however, is, without having more carefully considered the evidence, whether the fire was caused by the burning of the rummage, or whether it was not caused by the hedge, on account of the dryness of the season, being highly inflammable, catching fire. If the hedge had been green, as it usually is, it would have prevented the fire extending beyond the company's premises. What caused the damage, therefore, was, I rather think, the unusual state of the hedge. It is here that I doubt whether there was any evidence or negligence, or that

the company would reasonably anticipate that damage would arise from the grass burning. When the line was made the company could anticipate that the grass would catch fire, but then in ordinary weather they would anticipate that the fire would not reach beyond the hedge. If there had been a stone wall in the place of the fence the fire would not have occurred. I hardly think that during this seven weeks of dry weather the company was guilty of negligence in not removing the hedge and building a stone wall.

I quite agree with Channell, B., that when once the company had set fire negligently to the adjoining premises it is no answer to say that the damage was greater than could reasonably be expected. If a person accidentally injures another he must pay for the injury, according to the position of the party injured. If a railway company negligently kills a passenger, they might be bound to pay one million; and it would be no answer to say that they expected poor and not rich people to travel by the train.

PIGOTT, B.—I have no doubt in this case. I agree with the judgment of Keating, J., in the court below, and by whom the case was tried. There was some evidence of negligence considering the extraordinary dryness of the season, and the fact that the company knew that the engines must necessarily emit sparks. I think they were guilty of negligence in leaving heaps of rummage on the banks until they became highly inflammable. It was a question for the jury if the fire arose in that way. I think there was evidence from which they might fairly conclude that it did. When the fire once reached the field it spread in two directions; it was stopped in one direction, and it ran across the field towards the plaintiff's house in the other direction. Nothing, I think, happened but what the company might reasonably anticipate from leaving the heaps on the bank.

LUSH, J.—The fire arose from sparks sitting fire to the heaps, the dryness of the season and the wind caused it to spread to the hedge. The more likely that the banks and heaps of cuttings were to catch fire, the more careful the company ought to have been in taking precautions against such an accident.

BRAMWELL, B., concurred.

PROBATE.

CRICKETT v. FIELD (WILLIAMS & MAKEPEACE Intervening.)

Lost Codicil—Proof of factum and execution.

In preponing a copy of a lost codicil, it was proved by A. & B. that such a paper had existed, and by C. & D. the alleged attesting witnesses, that they had signed some paper for the deceased, but were unable to say whether it was testamentary or not. The Court held that in the absence of proof identifying the paper known to A. & B., with that signed by C. & D., there was not sufficient proof of the *factum* and execution of the codicil, and refused probate.

[19 W. R. 232.]

Charles Lane Crickett, late of Regent-square, Gray's-inn-road, died on 16th of October, 1869. His surviving issue consisted of one son, Charles Tomkins Crickett, and two daughters, Mrs. Field

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and Mrs. Makepeace. Two duly executed testamentary papers were found at different times in the depositories of the deceased: the one being a will dated the 6th of March, 1862, which was propounded by Charles Tomkins Crickett, the plaintiff, and the other being a codicil, dated the 31st of May, 1869, which was propounded by Mrs. Field, the defendant. Subsequently, in June, 1870, Charles Williams, as the duly elected guardian of his son, Charles Crickett Williams, a godson of the testator, obtained the leave of the Court to intervene for the purpose of propounding a memorandum of the contents of a lost codicil, dated the 25th of December, 1868, by which certain bequest made by the will of 1862, in favour of Mrs. Makepeace, were revoked, and diverted to the benefit of the son of the intervenor, Mrs. Williams. In consequence of this intervention, Mrs. Makepeace and her husband, in their turn, obtained leave to intervene, and pleaded, in opposition to the codicil propounded by Mr. Williams, non-execution and revocation; the plaintiff also pleaded revocation for the same purpose. No alteration of the bequests made to Mrs. Makepeace in the will of 1862, was made in the codicil of 1867.

The cause came on for trial before Lord Penzance, on the 16th of November, the sole question for decision being whether the memorandum of the codicil of 1868 was or was not entitled to probate. On the part of the intervenor Williams, it was proved that in 1864 the codicil was shown and read to him by the testator, and that, having thereupon made a note of the disposing part of it, he was now able to swear to its agreement so far with the memorandum before the Court. He had been an intimate friend of the testator. At the time the codicil of 1868 was made, Mrs. Makepeace had, by her conduct, rendered her father extremely dissatisfied with her. It was further proved that the testator's solicitor saw the codicil of 1868 when the codicil of 1867 was executed, and that the two codicils, together with the will of 1862, were then taken in his own custody by the testator, at whose request three other intervening codicils were at the same time destroyed.

The persons alleged to have attested the codicil were Miss Todhunter, the testator's amanuensis, and Harriet Wright, one of his domestics. Miss Todhunter deposed that she had signed, at various times, a considerable number of documents for the testator; and that on one occasion Harriet Wright had signed a paper in her presence. She was however unable to recollect having attested this codicil in particular. Harriet Wright, on the other hand, had only signed one paper for the testator, and she recollected that it was done on a Sunday (the 25th of December, 1868, fell on a Sunday). She was quite unable to say whether the testator had or had not signed the paper before her.

Dr. Swabey (Searle with him), for the plaintiff.

Pritchard for the defendant.

H. James, Q. C., (*Bayford* with him), for the intervenor-Williams.

Denman, Q. C. (*Inderwick* with him, *Makepeace*, submitted that there was no satisfactory evidence of the existence of the codicil of 1868.

LORD PENZANCE.—It has always been the practice of this Court to admit proof of the copies of the lost wills, but it has also invariably required that there should be sufficient proof of the *factum* of the instrument, the *onus* of proving its execution and contents being cast on those setting it up. In the present case, I am of opinion that there is not proof sufficient to meet the requirements of the Court.

One witness remembered that she went into a room and signed her name to a paper for the testator, but she was unable to give us any information from which we might gather what the nature of that paper was; it may have been any legal paper requiring signature. The other witness said she had, at different times, executed a great number of papers for the deceased, and her only evidence calculated to assist in identifying the paper signed by the other witness, was her statement that she recollected the servant being called into the room on one occasion, for the purpose of signing a paper in their presence. But this cannot be held to show that this paper was the paper in question, or that it was of a testamentary character. Then, again, as to identity, it is said that Mr. Williams and the testator's solicitor saw the codicil, and that they recollected it to have been attested by two women. Mr. Williams also recollects the name of one of its attesting witnesses to have been Miss Todhunter, but not that of the other.

It seems to me on these facts, that there is not a sufficiency of proof that the paper which the two men saw, was the same as that which had been witnessed by the two women, and that the proofs required by the Court have not been supplied; I must therefore pronounce against the codicil of 1868, and only hold the other two papers to be entitled to probate.

CHANCERY.

PRICHARD V. PRICHARD.

Will—Bequest—Words—"Principal money"—General personal estate.

In a very short will the testator gave the income of his "principal money" to his wife, for the support of herself and the education of his children, and at her death, or on her marriage, to be divided between them, and made no other disposition of his property. He died entitled to some real estate, and of personal property worth £40,000, consisting chiefly of the value of his shares in two businesses, but including certain leaseholds.

Held, that the words "principal money" included his whole personal estate, but not the pure realty.

[19 W. R. 226.]

This was a motion for a decree in a suit instituted by the executor of the will of Charles Henry Pritchard, to have it declared what was included in a bequest of the testator's "principal money."

The will was as follows:—

"This is the last will and testament of me, Charles Henry Pritchard. I appoint Thomas Henry Pritchard to be my executor, and I desire that the income arising from the principal money shall be paid to my wife while unmarried for the support of herself and the education of my children, and at her death or on her marriage to be divided among them, and I desire that my

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sisters Charlotte and Jennette, who have so long had the charge of my mother, and have so well learned how to secure her comforts should still continue to have care of her. As witness my hand this twenty-seventh day of June, 1864."

The testator died seized of real estate worth two or three thousand pounds, but mortgaged to nearly its full value, and personal estate worth about £40,000, which might be classed as follows: (1) The testator's shares in two businesses carried on by him in partnership, which, under provisions in the partnership deeds, were in each case to be taken by the surviving partner at a valuation and paid for by instalments, and which had been valued at £86,657 13s. 8d. respectively. (2) Certain leasehold premises valued at £268. (3) Furniture, &c., valued at £2,976 16s. (4) Shares in public companies valued at £65. (5) Cash at the bankers, £289 6s. 4d.; and (6) debts to the amount of £340.

It was admitted at the bar that the real estate could not pass by the will.

Ince, for the plaintiff, the executor.

Glasse, Q. C. (*Bird* with him), for the testator's widow.—Unless these is some explanatory context money means only cash, and money at the bankers: 1 Jarm. on Wills 3rd edit. p. 781. *Lowe v. Thomas*, 2 W. R. 499, 5 D. M. & G. 316 is in point. The value of the business is not money, though it will come to the testator's estate as money: *Manning v. Purcell*, 8 W. R. 273, 7 D. M. & G. 55.

W. Cooper, for the heir-at-law.

Cole, Q. C., and *Sargant*, for the testator's children, were not called upon.

MALINS, V. C., said the rule to be applied in interpreting the will was to ascertain the intention of the testator. The word money often meant money in the house, or at the bankers' only. If the testator gave his "ready money" or his "money" in such a manner as to distinguish it from his other property, money in the strict sense alone passed. Such was the case of *Manning v. Purcell*, where there was a residuary gift; and here, if there had been a residuary gift, money only would have passed. If the words were not restricted to mean the testator's money in the house and at the bankers only, they must be taken to mean his general personal property, and the question was between these two interpretations. Now it appeared the testator had very little money in the strict sense, and £40,000 worth of personal property. Under these circumstances, having a wife and six children to be provided for, he made a universal disposition of his property in these general words. [His Honour then read the will.]

By this he intends to provide for his wife, and his children are to be educated out of the income. If he had said "estate," "property," or "effects," all his personal property would have passed, but he had used the words "principal money." What he meant was "principal" or "capital," and in using the word "money" he must have meant money or money's worth. The wife would therefore take the income of his whole personal estate, and after her death or second marriage it would go to his children.

The rule of this Court for a very long time had been that money might mean general

property, or money in the strict sense of the word, and the only case against it was *Lowe v. Thomas*, which, in some respects, looked very much in Mr. Glasse's favor. He must confess he could not understand that case, and he should himself have considered that the words there carried the general estate, though he was, of course, bound to follow the decision. But in that case other property, as distinct from money, was given, and here the gift was a general disposition unaccompanied by any other gift.

As to the real estate, he thought the testator meant to include that also, but the Court always favoured the heir, and there were no words applicable to real estate. The same favour was not shown to the next of kin as to leaseholds, and he therefore decided, though not with so much confidence as he did with respect to the other personal estate, that the leaseholds also passed by the will.

SEATON V. TWYFORD.

Mortgagor and mortgagee—Principal not to be called in for a term—Default in payment of interest—Execution not stayed.

Where default having been made in payment of interest, a mortgagee has recovered judgment for the amount of the principal and interest, and a bill is filed to restrain execution and for specific performance, on the ground that the mortgage deed is not in accordance with the terms of a previous agreement, which provided that the principal should not be called in for a term still unexpired, an injunction will be refused except on the terms of the amount recovered being paid into court, since, if a clause in accordance with that provision in the agreement had been inserted in the deed, it would, as a matter of course, have made the not calling in of the principal conditional on the punctual payment of interest.

[19 W. R. 200.]

This was a motion to restrain the defendant *Simson* from proceeding to issue execution under a judgment recovered by him under the following circumstances:—

At the date of the agreement hereafter mentioned, the defendant, A. S. Twyford, was owner of a leasehold cottage and premises at Wimbledon, held by him on a lease for twenty-eight years from the 25th of December, 1863. By an agreement dated the 24th of April, 1868, the plaintiff agreed to purchase this cottage at the price of £500, and to take an assignment of the lease, and the defendant Twyford agreed to advance £400, part of the purchase money, on mortgage of the premises, and further agreed that this sum of £400 should not be called in for five years, though the plaintiff was to have the option of paying off the same at any time on giving six months' notice.

By deed, dated the 9th of May, 1868, the premises were accordingly assigned to the plaintiff for the remainder of the term; and by another deed of the same date, made between the plaintiff of the one part and the defendant *Simson* of the other part, the plaintiff, in consideration of £400, then paid by *Simson* to Twyford, mortgaged the same premises to *Simson*, the deed containing the usual covenant for payment of the principal within six months, and for payment of interest every 25th of March and every 25th of September, until the principal should be paid, and providing that, in case of default, the mortgagee might enter and take possession, but

containing no provision that the principal should not be called in for five years.

On the 12th of August, 1870, default having been made in paying the interest due on the previous 26th of March, Simson issued a writ against the plaintiff, claiming £409 15s. 10d. for principal and interest then due, and £2 15s. for costs; and on the 17th of November, 1870, judgment was given in his favour for those amounts. On the 1st of December, 1870, the plaintiff filed his bill against Twyford and Simson, praying that Simson might be restrained from issuing execution; that Twyford might be decreed to specifically perform the agreement of the 24th of April, 1868, and that, if necessary, the mortgage deed might be rectified.

On the part of the plaintiff it was contended that the defendant Twyford had acted as his solicitor in all these transactions, and was bound consequently to see that the mortgage deed contained the stipulation agreed upon, that the principal money should not be called in for five years. The plaintiff further alleged that he had executed the deed without any perusal or explanation of its contents. On this point there was a direct conflict of testimony.

It appeared from the evidence that, besides failing to pay the interest punctually, the plaintiff had neglected to pay the ground-rent due to the superior landlord until great pressure had been put upon him.

Willcock, Q. C., and Terrell, for the plaintiff.—The defendant Twyford was plainly the solicitor of the plaintiff, and bound to protect his interests. The action was founded on a covenant which ought not to have been introduced into the mortgage deed. As the judgment ought never to have been obtained, it is not incumbent on the plaintiff to pay the amount recovered into court.

Kay, Q. C., and E. T. Holland, for the defendant.—Supposing that the clause contended for had been inserted, it would, of course, have been in the usual form, which provides that, if the mortgagor makes no default in paying interest, the mortgagee will not call in the money for a certain period: Davidson's Precedents, vol. 2, pt. 2, p. 539. Here default has been made, so that the mortgagee can no longer be restricted in the exercise of his rights. See *Edwards v. Martin*, 4 W. R. 219, 25 L. J. Ch. 284; *Burrows v. Molloy*, 2 Jo. & Lat. 521; *Ex parte Rignold*, 3 Deac. 151. Again, this defence should have been pleaded in the action as an equitable plea; also the plaintiff has been guilty of delay in filing his bill.

Willcock, in reply.—An equitable plea cannot stand, unless the court of law can work out all the equity, connected with the case: Kerr on Injunctions, p. 27. As to the defendant to an action pleading an equitable plea thereto, and its effect on his right to an injunction to restrain that action, see *Waterlow v. Bacon*, 14 W. R. 865, L. R. 2 Eq. 514.

BACON, V.C., said that he regretted the conflict of evidence, but that, in his view, it would not be necessary for him to decide which evidence was the more credible. His decision turned on the terms of the agreement. A mortgage had been executed; an action had

been brought, and judgment recovered for the principal and interest due on that mortgage security; and a bill had been filed to restrain the mortgagee from issuing execution and to enforce specific performance of the agreement. Assuming that the plaintiff was entitled to specific performance, and that, under a decree to that effect, a reference had been made to chambers to settle the mortgage deed in accordance with the agreement, the deed, as so settled, would of course have been in the usual form, and the stipulation that the principal money should not be called in for five years would have been worded in such a way as only to bind the mortgagee so long as the mortgagor punctually paid the interest. No cases were required to prove that the failure of a mortgagor to observe his covenants would release the mortgagee from restrictions which were conditional on the observance of those covenants. This was a very strong case. The security was a small house, held for a short term, and subject to a heavy ground rent. The safety of the mortgagee required punctual payment of the interest. According to the argument at the bar, the mortgagee was to be utterly at the mercy of the mortgagor, who might at any time fail to pay the ground rent, and cause the forfeiture of the lease. Had there been a decree for specific performance, no such provision as that could have been inserted in the deed. It seemed to him that the facts, appearing in this suit, might have been pleaded as an equitable plea to the action; and, though there was great weight in the argument that possibly a court of law could not on that plea work the complete justice sought to be obtained by the bill, yet he was clearly of opinion that in that case the plaintiff ought at least to have filed his bill earlier. No injunction would be granted except on the terms of the plaintiff paying into court the whole amount which had been recovered on the judgment.

IRISH REPORTS.

COMMON PLEAS.

McMAHON v. IRISH NORTH WESTERN RAILWAY COMPANY.

Jurisdiction of Civil Bill Court—Costs—Commons Law Procedure Act, 1856 (Ireland) (19 W. R. 212), s. 57.—“Reside”—Railway Company—“Cause of action.”

Section 97 of the Common Law Procedure Act, 1856 (Ireland), enacts that “if in any action of contract where the parties reside within the jurisdiction of the civil bill court of the county in which the cause of action has arisen the plaintiff shall recover less than £20, he shall not be entitled to costs.”

Held, that a railway company “resides” in every county in which it has a ticket office.

Held further, that “cause of action” means “entire cause of action,” and therefore, where a contract made in county C. was broken in county M., in which the plaintiff and defendant resided, that the cause of action did not arise in county M. within the meaning of section 97 of Common Law Procedure Act (Ireland) 1856.

[19 W. R. 212.]

Motion by way of appeal from the taxation of costs in this suit, that the taxation of plaintiff's costs might be reviewed, and that plaintiff might be disallowed any costs of the proceedings in this cause. The action was brought in the Court

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of Common Pleas upon a contract made in the county of Cavan, and broken in the county of Monahan, in which the plaintiff resided, and where the defendants had a ticket office. At the trial the jury returned a verdict for the plaintiff for £50, which was subsequently reduced by the court to one shilling.

Walter Boyd, in support of the motion.—There are two questions in this case, both of which depend on the construction of section 97 of the Common Law Procedure Act, 1857.* First, do the parties "reside" with the same civil bill jurisdiction? Secondly, did the "cause of action" arise in the County of Monahan? As to the first, the plaintiff admittedly resides in the county of Monahan. The defendants had a ticket office in that county, which is a sufficient residence for the purposes of the section: *Evans v. Great Southern and Western Railway Company*, 5 Ir. Jur. O. S. 329. Secondly, "cause of action" means that which gives the plaintiff a right to be in court, i. e., the breach which took place in the county Monahan: *Betham v. Fernie*, 4 Ir. C. L. 92; *Powell v. Atlantic Steam Packet Company*, 10 I. C. L. L. App. xvii.; *Aston v. London & North Western Railway Company*, 15 W. R. 694, I. R. 1 C. L. 604; *Jackson v. Spittal*, 18 W. R. 1162, L. R. 5 C. P. 542. *Sichel v. Borch*, 12 W. R. 348, 2 H. & C. 954, was decided on the grounds that defendant was a foreigner, and *Pigott, B.*, expressed doubts though he acquiesced in the decision. In *Crowder v. Irish North Western Railway Company*, I. R. 4 C. L. 371, no judgment was given.†

Purcell, Q. C., and *Wilson*, opposed the motion.—A railway company resides where it carries on its business, but that is its general business: *In re Brown v. London & North Western Railway Company*, 11 W. R. 884, 4 B. & S. 326; *Shiels v. Great Northern Railway Company*, 9 W. R. 739, 30 L. J. 331; *Shelford's Law on Railways*, 14. Cause of action means entire cause of action. *Hurley v. Lawlor*, 6 Ir. Jur. 844; *Herniman v. Smith*, 3 W. R. 208, 10 Ex. 659; *Borthwick v. Walton*, 3 W. R. 208, 15 C. B. 501; *Aris v. Orchard*, 9 W. R. 106, 6 H. & N. 160.

Walter Boyd, in reply,

Cur. adv. vult.

MONAHAN, C. J. (after stating the manner in which the case came before the court.)—The question we have to determine is whether the plaintiff is entitled to any costs. It is necessary to ask whether the plaintiff reside within the jurisdiction of the civil bill court in which the cause of action has arisen. First, as to residence, the plaintiff does, no doubt, reside within the jurisdiction. Does the railway company do so? The question has arisen, and been decided many years since, whether a railway company resides where

it has a ticket office. In the Civil Bill Act of 1851 (14 & 15 Vict. c. 57) there is a precisely similar section to this. The question first arose in the Court of Exchequer in *Evans v. Great Southern Railway Company*, 5 Ir. Jur. 329. In that case the question arose on the Act of 1851. It was there decided that the railway company having ticket-offices upon the line within the county, had a sufficient residence there within the terms of the Act to enable the plaintiff to have proceeded against by civil bill within that county. A question arose whether this decision would apply under the Common Law Procedure Act of 1856 in a case in this court, *D'Arcy v. Hastings*, 10 Ir. C. L. App. xxiv. It was there held that the new section must have the same construction as that of the former Act. There has been a more recent case in the Court of Exchequer, where it was admitted that the parties resided within the same jurisdiction, the only question being whether the cause of action arose in that jurisdiction: *Enright v. Kavanagh*, 15 I. C. L. 142. The uniform course has therefore been such as has been stated. But it was argued that the decisions were different in England; and in *Re Brown v. London & North Western Railway Company*, 4 B. & S. 326, was cited. The words of the English Act are different (9 & 10 Vict. c. 95.) Therefore we adhere to the uniform course, and hold that the company, having a ticket-office in the county of Monahan, have a sufficient residence within the meaning of the section.

But what is necessary in order that the cause of action should be considered as arising in the civil bill jurisdiction? It is sufficient that the breach should be committed there? This question arose in *Hurly v. Lawlor*, 6 Ir. Jur. 844. This was an action for maliciously suing out a judge's fiat, and was decided on the ground that the entire cause of action should arise within the jurisdiction in order to entitle the plaintiff to costs. That case had been followed since in this country in *Crowder v. Irish North Western Railway Company*, Ir. R. 4 C. L. 371. It was objected that the judges gave no reasons for their decision in this case.* They did decide the case, and it is an express decision upon the point. We say that the decision is right. In England it has been held that in order to serve a process without the jurisdiction it is only necessary that part of the cause of action should accrue within the jurisdiction. In *Jackson v. Spittal*, 18 W. R. 1162, L. R. 5 C. P. 542, this very question was considered in an elaborate judgment. It was decided on this ground, that the Common Law Procedure Act is not an Act giving jurisdiction to the Court. The Court has inherent jurisdiction. The Act merely relates to practice and procedure, and therefore ought to get a liberal construction to bring such cases within its jurisdiction. But the civil bill courts got their jurisdiction from Act of Parliament. Therefore we think this case is distinguishable, and we will hold to a number of decided cases in refusing this application.

MORRIS & LAWSON, J. J., concurred.

No rule.

Section 97 of 19 & 20 Vict., c. 102, enacts that, "If in any action of contract . . . in the superior courts . . . where the parties reside within the jurisdiction of the civil bill court of the county in which the cause of action has arisen, the plaintiff shall recover . . . less than £20 . . . the plaintiff shall not be entitled to any costs unless the judge certify," &c., &c.

† The judgments in *Crowder v. Irish North Western Railway Company* are to be found in the report of the case in 17 W. R. 804. The judgments are not given in the report of the case in I. R. 4 C. L. 371.

* See note ante.

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IN THE MATTER OF THOMAS PRIMROSE, &c.

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UNITED STATES REPORTS.

Before U. S. Commissioner GEORGE GORHAM, Esq.

Reported for the *Law Journal* by F. W. MACDONALD, Esq.,
Barrister-at-Law.IN THE MATTER OF THE APPLICATION OF THE
CANADIAN GOVERNMENT FOR THE EXTRADITION
OF THOS. PRIMROSE, A FUGITIVE FROM JUSTICE.*Extradition—Robbery—Holding accused without process—
Proceedings before U. S. Commissioner—Questions of fact
for jury—Reasonable and probable cause—Trial by foreign
courts.*

On the 1st day of April, 1870, at Westminster, Ontario, one John Smith was assaulted and robbed by Thomas Primrose and others. Primrose fled, and was, on the 9th day of August, 1870, arrested in Buffalo, and immediately thereafter brought before Judge Burrows, on a writ of *habeas corpus*, and his discharge asked for, on the ground that he was detained without legal process. He was, however, held under this writ until the 27th day of December, 1870, on evidence being adduced that an application was being made by the Canadian Government for his extradition; and on that day, a mandate for his examination having arrived from the President, the writ was discharged, and prisoner taken into the custody of the United States Marshal, on a warrant issued by United States Commissioner Gorham.

Certified copies of depositions taken in Canada were filed with the Commissioner, and evidence adduced *pro* and *con*.

Held by Commissioner: 1. That his duty was merely that of a committing magistrate, and that he had only to enquire whether there was probable cause to believe that the crime of robbery had been committed, and that accused committed the crime.

2. That questions of fact were the exclusive province of a jury.

3. That the fact that Primrose, if held for extradition, is to be taken away to be tried in the courts of a foreign country, ought not to influence his decision one way or the other.

4. That he had entire confidence that accused would receive a fair trial in Canada: to suppose otherwise would be unjust and discourteous.

5. That the Extradition Treaty should be construed liberally and fairly to the prisoner; and while every reasonable opportunity should be given to the foreign power seeking the benefit of the treaty, the prisoner should not be remanded for trial unless there be a *prima facie* case against him, which is not overborne by the evidence adduced on his part.

[Buffalo, U.S., Dec. 20, 28, 1870.]

The prisoner, Thomas Primrose, was charged with having, on the evening of the 1st day of April, 1870, at Westminster, county of Middlesex, Ontario, in company with others, assaulted and robbed one John Smith, and of being accessory to the murder of one John Dunn. He was arrested in Buffalo in August last; and was subsequently brought before Judge Burrows, of that city, on a writ of *habeas corpus*, and his discharge asked for, on the ground of illegal detention, no process having been issued for his arrest. But in view of an application having been made for his extradition by the Canadian Government, and evidence as to that fact being given, he was from time to time remanded to jail, to await the mandate from the President for his examination before a United States commissioner; which mandate subsequently arriving, addressed to United States Commissioner George Gorham, informations were thereupon laid before the commissioner, charging the said Thos. Primrose with the said offences of robbery and murder; and the commissioner issued his warrant, addressed to the United States Marshal, commanding him to take the said Primrose into his custody upon the said charges, and bring him before the said commissioner for examination thereon. The above facts having been made appear in a

return to the said writ of *habeas corpus*, the same was thereupon discharged, and the examination of the said Thomas Primrose, upon the charge of the robbery of one John Smith, was then proceeded with before the said commissioner, counsel for claimants declining to offer evidence upon the charge of murder.

The following copies of the original information, taken before Lawrence Lawrason, Esq., police magistrate, at London, and warrant issued thereon, duly certified to be true copies by the said police magistrate, were filed with the commissioner on behalf of the claimants:

CANADA, } I, Lawrence Lawrason,
Province of Ontario, } of the City of London, in
County of Middlesex. } the County of Middlesex,
To wit. } in the Province of Ontario,

and Dominion of Canada, one of Her Majesty's Justices of the Peace in and for the said County, do hereby certify that the paper writing annexed hereto, and marked A, is a true copy of the original information or deposition, taken before me, by John Smith, on complaint against Thomas Primrose and others for the crime of robbery: and I further certify that upon the laying of such information or deposition, I did issue a warrant for the arrest of the said Thomas Primrose and others therein mentioned: and I certify that the paper writing hereto annexed, marked B, is a true copy of the warrant so issued by me as aforesaid, and that the same was duly delivered into the hands of Thaddeus VanValkenburgh, a constable for the said County, to be by him executed according to law: and I further certify that the said original information or deposition is in my possession, and that the said constable has the said original warrant. And I also certify that the annexed copies of deposition and warrant are hereby properly and legally authenticated, so as to enable them to be received in evidence, in the tribunals of Canada, of the criminality of the person charged therein of robbery.

Given under my hand, at the City of London, in the Province of Ontario, and Dominion of Canada, this 26th day of September. A.D. 1870.

(Signed) L. LAWRASON,
J. P. & P. M.

and further certified by the principal diplomatic or consular officer of the United States resident in Canada, as follows:

CANADA, } I, William H. Calvert, of
Province of Quebec, } the City of Montreal, Domi-
City of Montreal. } nion of Canada, Vice-Con-
sul-General of the United States of America, and being the principal diplomatic or consular officer of the United States of America at present residing in Canada, do hereby certify that Lawrence Lawrason, of the City of London, in the County of Middlesex, Province of Ontario, and Dominion of Canada, Esquire, was, on the first day of April, in the year of our Lord 1870, and from that time up to the present has continued to be, and still is, a Justice of the Peace in and for the County of Middlesex, in the said Province of Ontario, and, as such Justice of the Peace, was and is duly authorized to hear all complaints of felony and misdemeanor, and take informations, and grant warrants thereon: and I do hereby further certify that he is by the laws

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of Canada authorized to sign and issue such warrants as such Justice of the Peace. And I do further certify that the annexed copies of information or depositions, warrant and certificate, are properly and legally authenticated, so as to entitle them to be received in evidence, in the tribunals of Canada, of the criminality of the person charged therein of robbery. And I do further certify that the signature, L. Lawrason, to the annexed certificate, is in the proper handwriting of him the said Lawrence Lawrason.

Given under my hand and seal of office, at the City of Montreal, in the Province of Quebec, and Dominion of Canada, this fifth day of Oct. 1870.

(Signed) WM. H. CALVERT,
Vice-Consul-General.

Evidence was adduced on the part of both claimants and prisoner. On the part of the former it was proven that on the evening of the 1st day of April, 1870, one John Smith was at a tavern, kept by one Lively, at Westminster, in the county of Middlesex, Ontario, in company with a pensioner named Dunn, who had that day drawn his pension-money. The prisoner and several other persons, charged as his accomplices in the subsequent robbery, were also there, drinking with Smith and Dunn, according to Smith's evidence, who says that about half-past seven o'clock that evening he started to go out of the tavern, and was followed by the prisoner, who insisted upon seeing him (Smith) home; that after he had proceeded about three rods from the door of the tavern, he was caught from behind and pinioned; that prisoner raised his (Smith's) arm, and forced it back so as to cover his mouth, bending his head back; he says he was also struck on the head with something; his pockets were then searched, and some money and articles extracted therefrom. Upon regaining an upright position, he recognised prisoner, who still had hold of his arm. After being robbed he was allowed to go at liberty, and at once made his way to the London police station, and there stated to the chief that he had been robbed at Westminster, and was afraid Dunn would share the same fate. The chief declined interfering in the matter, as Westminster (which is divided from London by Clarke's Bridge) was not within his jurisdiction. A man named Hughes testified that he passed Lively's tavern at six o'clock on the evening in question, and saw prisoner and Smith there, as also those charged as prisoner's accomplices. The chief of the London police corroborated Smith's evidence as to the complaint made by him, and further stated that Smith, although he appeared to have been drinking, told a straight story. This, together with evidence that prisoner had not been seen in London or thereabouts since the robbery, closed the case of claimants.

The defence set up was, that Primrose was not on the Westminster side of Clarke's Bridge from five o'clock until half-past nine o'clock on the evening of the first day of April, and therefore could not have committed the offence charged. A man named Gagan stated that he was with prisoner on the London side of the bridge all that time; Albert, a brother of prisoner, said he saw Gagan and prisoner on the London side of the bridge that evening; and Edward Primrose, another brother, stated that he was a brakeman on the Great Western Railway, and that on the

day in question his train (a construction train) arrived at London from Windsor about four o'clock, p.m., and on going on to the platform of the station he met his brother (the accused) and Gagan, and remained with them until half-past eight o'clock, p.m., with the exception of an interval from a quarter past five o'clock to six, p.m., when he was at tea. Other evidence was adduced to show that Smith was not at Lively's when the alleged robbery took place. On this evidence rested the case for the defence.

In rebuttal, counsel for claimants produced the conductor of the train on which Edward Primrose was brakeman, and he testified that on the day in question he started from Windsor with his train at 10.50 a.m., and did not arrive at London until 8.25 p.m.; and that Edward Primrose was with him on said train all that time, as one of his brakemen. He also produced his time-book (kept by all conductors), in which entries were made each day of the departure and arrival of his train at each station, which bore out his testimony, and in which Edward Primrose's name was entered as brakeman on the day in question.

This closed the evidence on both sides, the taking of which had extended over several months, and on the 20th December last the case was argued before the said commissioner.

J. Cook, of Buffalo, counsel for the prisoner, moved for his discharge:—

As to the fact of the robbery having been committed, the claimants must rely altogether upon the evidence of Smith; and such being the case, Smith's evidence was contradicted in so many particulars by the evidence on the part of the defence, that it was unsafe to place implicit reliance upon it. The facts disclosed raise a very strong suspicion, if not presumption that Smith had robbed his friend Dunn, and in order to avert suspicion had accused the prisoner and other parties of the crime alleged. The commissioner must be satisfied, first, that an offence had been committed; second, that Primrose is the guilty party. The evidence produced on the part of the defence prove a complete *alibi*, and a sufficient doubt is raised as to the guilt of prisoner to entitle him to a discharge. If the commissioner should find against the prisoner he does not simply commit him to the courts of the United States, as a proper case to be presented to a grand jury of said courts, but his decision is of vastly more importance, as he would commit him to be taken to a foreign land, to be dealt with by strangers, amongst whom might be one who might regard his own safety as depending upon a conviction of the prisoner. If prisoner is extradited upon the suspicious testimony of Smith, uncorroborated as it is, where is the protection which the Government of the United States guarantees to those who are entitled to it?—for it has been well observed, that if this doctrine were to prevail, the liberty and character of every man in the country would be placed at the mercy, not of the examining magistrate (for he would have to assume that he had no discretion), but of any corrupt and infamous individual who might think proper to make a positive oath that a felony had been committed by the person whom he accused. The commissioner is to judge of the credit to be given to the

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witnesses who are produced to sustain the charge, and it is his duty to discharge the accused unless he is entirely convinced that there has been a *prima facie* case made out against him.

F. W. Macdonald, of the Ontario Bar (who was allowed to conduct the case for the claimants by the courtesy of the Commissioner and counsel for prisoner), for claimants:

The evidence of Smith is corroborated in every particular by witnesses produced on the part of the claimants, except as regards the actual commission of the offence, of which he is the only one who can give evidence. With regard to the *alibi* attempted to be proved, that was most effectually disposed of by the evidence of the conductor of the train on which Edward Primrose was brakeman; and as the evidence of the witnesses for the defence all point to the same day, it is evident that they are speaking of a day other than the first day of April, or are committing wilful perjury.

The Extradition Treaty provides that the prisoner shall be extradited on such evidence of criminality as, according to the laws of the State of New York, would justify his apprehension and committal for trial: 1st vol. Brightley's Digest, p. 270, sec. 7; 6 Opinions of Attorney-General, 207; 14 Howard's Supreme Court Rep. 193, 144; 3 Wheeler's Cr. Cases, 482.

The rule of evidence is prescribed by the Treaty: 4 Opinions of Attorney-Gen., 330, 201. If, after the examination of complainant and witnesses on both sides, it appears that an offence has been committed, and that there is probable cause to believe the accused guilty, the commissioner must commit for trial: Rev. Stat. N. Y., p. 709, sec. 25; Barbour's Cr. Law, 567.

The true enquiry is, whether the whole evidence has furnished reasonable and probable cause for believing that prisoner is guilty of the alleged crime or offence. If it does, he should be committed: 1st vol. Arch. Cr. Pleadings, 45, note. When the commissioner or magistrate is convinced that the facts as proved do not furnish probable cause for believing prisoner guilty, he ought to discharge him; but, on a question of facts entirely, if he should have a reasonable doubt, he ought to commit prisoner for trial, as it is the province of a jury to decide questions of fact. But if not entirely satisfied that prisoner is guilty, yet if the circumstances proved are positively suspicious, and such as to render his guilt probable, and the crime be an indictable offence, he should commit: Swan's Justice, 482; 1 Burr's Trials, 11, 15; 4 Dallas, 112. That degree of evidence is not required which would be necessary for the conviction of the party. The commissioner must ascertain whether there is reasonable ground to believe that the party accused may have committed the crime: Barbour's Cr. Law, 565.

It must be proved, 1st, that an offence has been committed; 2nd, that it is within the Treaty; 3rd, that there is reasonable and probable cause to believe prisoner guilty.

1st. The offence charged is robbery. As to its commission, we have the depositions taken at London before the police magistrate there, properly certified, &c., which are in themselves evidence of the fact that a crime has been com-

mitted, and that the accused is the person who committed the same: 1 vol. Brightley's Digest, 270; 2 Ib. 134. There is also the evidence adduced on the part of the claimants, which is positive.

2nd. The crime charged is robbery, and is within the Extradition Treaty.

3rd. The evidence, as a whole, furnishes reasonable and probable cause sufficient to warrant the committal of the accused for trial. Before the commissioner can come to the conclusion to discharge the prisoner, he must be satisfied that the case made out by the claimants is so entirely displaced by the evidence on the part of the defence, that there can be no doubt of the innocence of the accused.

The defence set up is purely an *alibi*, which must be strictly proved in the face of the evidence on the part of the prosecution, and must be so overwhelming in all its parts as at once to carry conviction with it. Is it so in this case?—or rather, is not the *alibi* so completely met as to fall to the ground? There is an evident attempt to get in false testimony to sustain the theory of the defence. If proved false in part, does not suspicion attach to the rest?

There is no process to compel the attendance of witnesses, and it is a difficult matter to induce parties to attend in a foreign country to give evidence, the natural inclination of parties being to refrain from giving evidence against neighbours. The claimants have experienced this difficulty in this matter.

It is ridiculous to suppose that Smith should endeavour to throw suspicion on prisoner, and at the same time state that so many persons were at Lively's, any one of whom could disprove his allegations if untrue.

No evidence of good character was adduced on the part of the defence.

As to conflicting evidence, &c., see *In re Bennett G. Burley*, 1 U. C. L. J., N. S., 46, 48, 49, 50; *Ex parte Martin*, 4 U. C. L. J., N. S., 198; *Regina v. Reno & Anderson*, Ib. 315, 321.

When the court enters upon the consideration of evidence for defence, a trial of fact has begun, and it is the peculiar province of a jury to determine questions of fact. If the prosecution make out a good *prima facie* case, and evidence on the defence throws doubt upon it, it is the province of a jury to pass upon it.

It is certainly due to the citizens of the United States that they should be protected against murderers, and those who attempt to commit murder, and against pirates, robbers, &c., and that these men should be extradited on the demand of a foreign government, where the crime was committed, and there punished.

GEORGE GORHAM, U. S. Com.—The prisoner's extradition was asked for upon two charges, one of murder and the other of robbery, both at Westminster, Province of Ontario, and Dominion of Canada. The person murdered is said to have been John Dunn, and the robbery was from the person of John Smith, and both deeds are alleged to have been done on April 1st, 1870.

Aside from the complaint made before the Canadian magistrate, and the warrants issued thereon against this prisoner, there is no evidence to warrant me in holding Thomas Primrose upon the charge of murder; and as that is not suffi-

U. S. Rep.] IN THE MATTER OF THOS. PRIMROSE, &C.—GARRARD V. HADDEN. [U. S. Rep.

cient, he is discharged from custody upon that charge.

Upon the charge of robbery, a long and exhaustive examination has been had, and every facility afforded both to the British Government and to the prisoner.

It is not necessary to review the testimony at length. Smith, the complainant, was produced, and swore positively that he was robbed, as charged, by Primrose, on the evening of April 1st, 1870; and the defence offered is, that at the hour when the crime is alleged to have been committed, Primrose was in London, and so far from the scene of the robbery that its commission by him was impossible. The prisoner's brother, a brakeman on a working train of the Great Western Railway, testified to having left his train at London, at the close of work, about four o'clock in the afternoon of April 1st, and having been in company with prisoner nearly all the time after that, until nine o'clock in the evening, and that one Gagan was with them; and Gagan is produced, and makes a similar statement. A young boy, another brother of the prisoner, testified to seeing the prisoner and Gagan and Edward Primrose in London, as detailed by Edward.

If these statements be true, Thomas Primrose did not commit the crime; but I am not satisfied of the truth of these stories.

The prosecution have produced the conductor of the train upon which Edward Primrose was employed, and he has shown his time-book (kept by all conductors); and I am satisfied that on the first of April Edward Primrose did not reach London till about eight o'clock, and that either he and Gagan and the lad are mistaken in the day of which they speak, or have committed wilful perjury. Smith, too, is borne out in his statements by other witnesses, who swore to seeing prisoner at the place of the alleged robbery about the time in question.

My duty is simply that of a committing magistrate, and I am only to enquire whether there is probable cause to believe that the crime of robbery has been committed; and if so, whether there be like cause to believe that the prisoner committed the crime. I am not to try issues of fact: this is the exclusive province of a jury, with which I have neither the right nor the inclination to interfere.

The fact that if held for extradition, the prisoner is to be taken away from this country, to be tried in the courts of a foreign power, ought not to influence my decision one way or the other. I have entire confidence that the accused will receive a fair trial in Canada: to suppose otherwise would be unjust and discourteous.

The Extradition Treaty should be construed liberally and fairly to the prisoner; and while every reasonable opportunity should be given the foreign power seeking the benefit of the Treaty, the prisoner should not be remanded for trial unless there be a *prima facie* case against him, which is not overborne by the evidence adduced on his part.

In this case I cannot have any doubt but that had the crime been committed in my own country, any magistrate would deem it his duty to commit the prisoner to await the action of a grand jury; and, entertaining such views, I

cannot deny the application of the British Government.

The prisoner will therefore be recommitted to the custody of the Marshal, to await the granting of a warrant of extradition by the President.

SUPREME COURT OF PENNSYLVANIA.

GARRARD V. HADDEN.

Where a blank in a note had, after signing and delivery by the maker, without his consent, been filled so as to increase the amount, and not be detected by inspection, held, that the maker was answerable for the full face of the note, as altered, to any *bona fide* holder for value in the usual course of business.

Opinion of the Court by THOMPSON, C. J., Jan. 8rd, 1871.

There could be no question but that the alteration made in the note in this case would avoid it as between the maker and payee, the consent of the latter to it being wanting, and there being neither an implied or express authority for making it.

But how is it with the plaintiff, an innocent holder for value, in the usual course of business? There was a blank in the body of the note (a printed note) between the words "one hundred" and "dollars," when the maker signed and delivered it. The payee afterwards filled the blank with the words "*and fifty*," which made the note read "one hundred and fifty," instead of "one hundred," the sum for which it was drawn. In this condition it was taken by the plaintiff, without the least grounds existing for any doubt of its entire genuineness. "By inspection of the note," says the learned judge in his opinion on the reserved question, "the most skilled expert would have failed to detect any alteration in its make." There was no difference in the handwriting between the words added and those which preceded them; no difference in the ink, and no crowding of words, to put the most careful man on inquiry, or to raise a suspicion that all was not right. The note thus clear on its face, was taken on the credit of the drawer, and now shall he be discharged from its obligation by reason, or on account of his own negligence in delivering a note that invited tampering with? He could have saved all difficulty by scoring the blank with his pen. It would have been impossible almost to have written all this without leaving traces of the alteration. In that case a purchaser of the note would take it at his own risk. This is, therefore, one of the cases in which it is a maxim, that "where one of two innocent persons must suffer, he shall suffer who by his own acts occasioned the confidence and the loss." Story, Eq., ss. 387. "If a bill or check be drawn in no careless a manner as thereby to enable a third person to practice a fraud, the customer and not the banker must bear the loss." Chitty on Bills, s. 6; Byles on Bills, 382; 22 Eng. L. & Eq., 516; 81 Barb. 100; 41 Ib. 465. "A party who entrusts another with his acceptance in blank is responsible to a *bona fide* holder, although the blank be filled with a sum exceeding that fixed as a limit by the acceptor. Though the filling of the blank in violation of the agreement of the parties be a forgery, the acceptor is estopped from setting up

U. S. Rep.]

GARRARD V. HADDEN—EVERLY V. DURBOROW.

[U. S. Rep.]

the fact." 7 Smith (N. Y. Rep.) 531. Denio, J., in delivering the opinion of the Court of Appeals in this case says, among other things, "the principle which lies at the foundation of these actions, I think, is that the maker who by putting his paper in circulation has invited the public to receive it of any one having it in possession with apparent title, is estopped to urge the actual defect of title against a bona fide holder." The doctrine of the point is ably discussed by the learned judge, and the cases touching the subject are noticed and discussed. The doctrine is, however, but an elaboration of a great principle of justice, that if one by his act, or silence, or negligence, misleads another, or in any manner affects a transaction whereby an innocent person suffers a loss, the blameable party must bear it. Story's Eq. 386-87.

In *Young v. Grote*, 4 Bing., 253, and reported in 12 Moore, 484, also, the very case in principle with the one in hand may be found. It was an alteration by filing spaces or blanks negligently left in a check, and filled by the holder so as to increase the amount and not be detected by inspection of the paper. The bank paid it, and the drawer was held chargeable for the full amount on the ground of his negligence. The same doctrine was held in two Scotch cases, viz: *Ragore v. Wylie* and *Graham v. Gillespie*, to be found in full in Ross on Bills and Promissory Notes, 194-95. It is true that the case of *Wade v. Wittington* in 1st Allen 561, seems to limit the doctrine to cases where the alteration is made by an agent, clerk or confidential party; but this, in my opinion, is against an earlier decision in that State—I refer to *Putman v. Sullivan*, 4 Mass. 45, in which no such restriction appears, and is an impracticable limitation.

In *Hall v. Fuller*, 5 B. & C., 750, the case was that of an alteration of a bill perceptible on its face. The bankers paying it were only allowed to charge the drawer with the original amount put in the draft, for it was negligence on their part to pay the face of it in its altered aspect. Such seems to have been the doctrine applied by this Court in *Worrall v. Gheen*, 3 W., 388; although the case of *Hall v. Fuller*, asserting the same doctrine, does not seem to have been cordially approved in the opinion.

I regard this case as depending on the principles of the other cases cited above, and not that of *Worrall v. Gheen*. That was a case of a perceptible alteration, and the plaintiff was allowed to recover only to the extent of the original unaltered note, the holder (the plaintiff) being entirely innocent of the alteration, or of knowing anything about it. But in the case in hand there was no perceptible alteration on the face of the note whatever. The handwriting was all the same, and there was no crowding of words to effect the insertion—all was natural and regular in appearance. The words "and fifty" were inserted in the space between the words "one hundred" and the word "dollars" in the note, by the same hand that filled up the note originally. It had been delivered to him in this condition. The authorities I have referred to hold the drawer of such a note answerable for the full face of the note as altered to any bona fide holder of it for value, on the ground of the negligence of the maker in leaving the blank in the note which

was thus filled up after its execution, and so we now hold, notwithstanding as between the maker and payee, or other person making the alteration, it would be a forgery and void.

We think this rule is necessary to facilitate the circulation of commercial paper, and at the same time increase the care of drawers and acceptors of such paper, and also of bankers, brokers and others in taking it. This rule will not apply to cases where the alteration is apparent on the face of the paper. There it is possible the rule of *Worrall v. Gheen* may apply. The only error, therefore, which we discover in the judgment on the reserved question, was against the defendant in error. By the rule which I have endeavored to deduce from the cases, he was entitled to judgment for the face of the note and interest. But the defendant in error is not a complainant here, and the plaintiff in error makes no complaint that the judgment against him is too small, and as there is no error of which he complains, the judgment is affirmed. —*Pittsburgh Legal Journal*.

EVERLY V. DURBOROW.

Where one partner contributed money to the common stock, and the other his time and skill, and the whole was lost: held, that the partner contributing the money could not recover any part of his loss from the other.

Sur bill, answer and agreement of counsel as to facts.

Opinion by SHARSWOOD, J. Delivered February 4th, 1871.

The question presented upon the agreed statement of facts is one of some novelty; at least the industry of the counsel has not furnished me with any decisions which throw light upon it. Two persons enter into a co-partnership; one agreeing to contribute \$10,000 as capital, the other nothing but his knowledge of the business. After two years the firm is dissolved, its affairs wound up, all its debts paid; and it is found that its entire capital has been lost. The partner who contributed the money capital now calls upon his copartner to bear half his loss, to repay him half the sum he put in. It is beyond a question that the money was put in as stock or capital; it was not an advance or loan to the firm. The article is unequivocal, "Everly shall contribute the sum of ten thousand dollars capital against Durborow's knowledge of the business." Mr. Lindley says: "Whatever, at the commencement of a partnership, is thrown into the common stock, belongs to the firm, unless the contrary can be shown." Lindley on Partn. 546. What is added does not contradict this. "At the expiration of this partnership this capital shall be returned without interest before final division of profits." But here there are no profits to be divided; there is no capital to return. Everly has lost his money, and Durborow has lost what he set against it, his time and services, enhanced in value by his knowledge of the business.

Bill dismissed with costs.

—*Legal Gazette*.

CORRESPONDENCE—REVIEWS.

CORRESPONDENCE.

Will making in the Ontario Legislature.

TO THE EDITORS OF THE LAW JOURNAL

GENTLEMEN:—As I hear the Parliament of Ontario are making and changing the wills of testators, I wish to enquire of you whether it would probably be of any use for me to apply to that Honourable body to supply a deficiency in my father's will. The elder brothers of the family and my sister had each their farms given them many years ago by proper deeds, but my father kept the homestead in his own hands until his death, and disposed of it by will to my younger brother and myself, who had worked the farm from our boyhood after our brothers left home, and took care of him in his declining years, but he unfortunately got a neighbor to prepare the will, which the lawyers say is all right in every respect, except, that *there is but one attesting witness*. Do you think the Parliament would pass an act to make the will valid notwithstanding? If not, why should they not as well as change the will of the late Mr. Goodhue, of London.

Yours, &c.,

NEIL McKELLAR.

[The difficulty is not so much to know what the members of the Legislature of Ontario, who have just returned to their homes, *would* have done, but rather what they *would not* have done—at least, so far as private Bills is concerned.

In the case put, there would be some show of reason for passing an Act to make the will valid, for it would probably be carrying out the wishes of the testator; whilst in the Goodhue case the collective wisdom, justice and equity of Ontario not only did not carry out the testator's carefully expressed intention, but did exactly the reverse. They felt so alarmed, however, as to the lengths this kind of legislation might lead *their successors*, and so ashamed of their part in it, that immediately after passing the Goodhue Act they passed another, giving power to the Judges to report to the House "in respect of any estate Bills, or petitions for estate Bills, which may be submitted to the Assembly." As far as precedents are concerned, there are enough and to spare for our correspondent's comfort.]

—Eds. L. J.

Professional advertising.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—I am a subscriber to *Lovell's Dominion Directory*, and having just received a copy, I find that while I am simply mentioned as Barrister, &c., one of our legal firms appears as follows:

"M. & C., (names given in full) barristers, notaries, &c.—are highly recommended for making prompt collections in all parts of Ontario. Cor. King and James Streets."

If this emanated solely from Mr. Lovell or his agent, I must be content with complaining of his partiality to these gentlemen; but if the advertisement, as I suspect is the case, was written or prompted by that firm, I think it should get a little more publicity by appearing in your Journal—unless indeed you object to anything *so unprofessional* having a place there. I am yours, &c.,

AN AGGRIEVED SUBSCRIBER.

Hamilton, 20th February, 1871.

[We do certainly object to any thing unprofessional, and do not propose to give any further advertisement to this firm, except in a legitimate manner, and therefore put only the initials. We trust it was only a little spontaneous generosity on the part of the publishers of the Directory.]—Eds. L. J.

REVIEWS.

THE LAW TIMES AND LAW TIMES REPORTS.
10 Wellington-street, Strand, London, W.C.

THE SOLICITOR'S JOURNAL AND WEEKLY REPORTER. 12 Cook's Court, Carey-street, London, W. C.

THE LAW JOURNAL. 5 Quality Court, Chancery Lane, London.

Our readers have ample means of judging of our appreciation of the value of these standard legal periodicals, from the liberal use we make of their pages. The new issue of Law Reports may have affected them to a certain extent, so far as the increase of circulation of the several reports is concerned, but in no respect have the reports deteriorated: in fact the competition has only incited them to greater efforts.

The following notice appears in the *Law Times* of 25th February

REVIEWS.

"In accordance with a generally expressed desire that the *Law Times Reports* should be printed in a larger type, so as to be more readily referred to in the Courts where they are now so extensively cited, the number of next week, beginning a new volume, will be printed accordingly. This will necessitate a slight increase in the size of the page, but no additional charge will be made.

"The series called the *Bar Reports* will close with this number, and will in future be styled the *Law Times Reports*, and will be published in a wrapper, in weekly numbers at 1s., so that in future the *Law Times* may be had without the *Reports*; or the *Reports* (in a wrapper) without the *Law Times*; or together as hitherto."

AMERICAN LAW REVIEW. January, 1871.
Little, Brown & Co., Boston.

The articles in this number are: I. The Burden of Proof in cases of Negligence; II. Expert Testimony; III. Contraband of War; IV. Ultra Vires; and the usual Digests of English and American Reports, Book Notices, Summary of Events, Correspondence, &c. In the Summary of Events we notice the following:—

"At a recent sale of part of Chancellor Kent's library, in Boston, a copy of 'Story on the Constitution' was bought, on the fly leaf of which was discovered this curious note, in the Chancellor's handwriting:

'March 18, 1835. Judge Story called on me at my office in New York. He said that he should write and publish a volume of Commentaries a year, until he had published twelve volumes. The one now forthcoming is on English and American Equity Law, and the one after that will be on Practice and Pleadings in Equity. The last two will be (1) on Natural and Public Law, and (2) on the Principles of International Law, as adapted to modern society. His greatest authorities on the science of government, as he thinks, are Aristotle, Cicero and Burke. In a French translation of Aristotle on Politics, he found that Aristotle treated of representative government of the people, and said it would not do, and never could do, because the people never could be brought for any length of time to choose the most wise and virtuous men to govern them. Whoever reads *Cicero de Republica* would see the evils of democracy as they are and always will be. He says that Hamilton was the greatest and wisest man of this country. He saw fifty years ahead, and what he saw then is *fact now*. Next to him in wisdom and sense, intuitive rectitude and truth and judgment, is C. J. Marshall.

'He says all sensible men at Washington, in private conversation, admit that the Government is deplorably weak, factious and corrupt; that everything is sinking down into despotism, under the disguise of a democratic government. He says the Supreme Court is sinking, and so is the Judiciary in every State. We began with first-rate men for judicial trusts, and we have now got down to the third-rate. In twenty-five years there will not be a judge in the United States who will not be elective, and for short periods, and on slender salaries. Our constitutions were all framed for man as he *should be*, and not for man as he *is and ever will be*.'

THE LAW SCHOOL OF HARVARD COLLEGE. By Joel Parker.

This is the title of a pamphlet published in answer to some remarks that appeared in the *American Law Review*, relating to the School of which Mr. Parker was for nearly twenty years the senior professor. The matter of it is doubtless interesting to those who are connected with that institution, and we presume its character is safe in the hands of Mr. Parker. It only occurs to us, as an outsider, to remark upon the curious and somewhat irreverent mixture of quotations that appear on the outside and inside title page. The former introduces the subject with the beginning of that inimitable *brochure*, which commences thus:

"Which I wish to remark,
And my language is plain,
That for the ways that are dark,
And for tricks that are vain,
The heathen Chinese is peculiar,
Which the same I would rise to explain."

The very next page, similar in all other respects, has simply this quotation:

"So fight I, not as one that beateth the air."

Either one, possibly, might have been appropriate, but the combination is objectionable.

SCIENTIFIC AMERICAN. Munn & Co., New York.

We notice in the "Votes and Proceedings" of the House of Commons a report of the learned and invaluable Librarian in which he says:

"In the selection of books for the augmentation of the library, it has been deemed advisable to bestow particular attention to the subject of mechanics and engineering, on account of the great and increasing demand, amongst those who

REVIEWS—ITEMS.

frequent the same, for information thereon. Your Librarian has accordingly purchased complete series of the Minutes of Proceedings of the Institution of Civil Engineers since 1837; of the Journal of the Franklin Institute of Pennsylvania from 1826; and from the *Scientific American* from 1859; all of them works of the highest utility in practical science, and which, from their cost and magnitude, are beyond the reach of ordinary private purchasers."

CANADIAN ILLUSTRATED NEWS. Montreal.

This improves week by week, and is a credit to the Editors and Publishers.

THE LAW OF NEGLIGENCE. By Robert Campbell, M.A. - Stevens & Haynes, Bell-yard, Temple Bar, London.

Will be fully noticed hereafter.

LAW MAGAZINE AND LAW REVIEW. February, 1871. Butterworths, Fleet Street, London.

Will be fully noticed hereafter.

LA REVUE CRITIQUE DE LEGISLATION ET DE JURISPRUDENCE DU CANADA. Montreal: Dawson Brothers.

Will be fully noticed hereafter.

LA REVUE LEGALE. RECEUIL DE JURISPRUDENCE ET D'ARRETS. Vol. 2. Sorel, P. Q.

AMERICAN LAW REGISTER. D. B. Canfield & Co., Philadelphia.

THE COURT OF QUEEN'S BENCH.—The Court of Queen's Bench has during the last ten days played the part of a strict disciplinarian. Terrible threats of striking out cases in the Special Paper when counsel are wanting at the moment the cases are called on, threats of fines and striking out when judges' notes are unstamped, or even when the paragraphs of special cases are unnumbered—these and like menaces put forward to frighten counsel, attorneys, and attorneys' clerks into a proper attention to the business of the court, have been followed in certain instances by fulfilments which show that this time the court is really in earnest. This *de rigueur* style of action necessarily inflicts anxiety, trouble and inconvenience on the bar and the attorneys, and expense on the innocent suitors. But what is the Court to do? If it were always easy, good-natured, and obliging, willing to condone this omission, pardon that offence, ready to postpone this cause and to bring on that cause out of its turn, chaos would inevitably return and sit triumphant in the very seat of law and order. It is impossible for a Court exercising so varied and

extensive a jurisdiction to keep down the arrears in the Crown Paper and in the Special Paper, and to get through the New Trial Rules before new sittings and new assizes bring in a new flood of cases, unless some attempt is made to compel attorneys to be in readiness at the given moment. English judges are possessed of proverbial patience, and their thunder is always more alarming than their thunderbolt. But that they should be annoyed when matters of form universally known are neglected, to the absolute destruction of business, is neither astonishing nor desirable. —*English paper.*

LAWYERS IN EUROPE.—Recent statistics develop some facts of interest with regard to the number of lawyers in different European countries, and their ratio to the population at large. For example, we learn that in England there is one lawyer to every 1,240 of the population; in France, one for every 1,970; in Belgium, one for every 2,700; and in Prussia, one for every 12,000 only. Another curious fact is, that in England the number of persons belonging to each of the different professions is nearly the same. Thus, there are 34,970 lawyers, 35,483 clergymen, and 35,895 physicians. In Prussia, on the other hand, there are 4,809 physicians to only 1,362 lawyers.—*Bench and Bar.*

RAILWAY ACCIDENTS.—A learned judge remarked that he had lately five cases before him of claims for compensation against railway companies, and that the jurors had found in favour of the defendants. The companies had better pause before they agitate to take from juries the right of assess damages. Such a change would be exceedingly unpopular, and we are not sure that the companies would get better treatment from any other tribunal. The juries give the companies the benefit of any doubt as to their responsibility; but if the responsibility is proved, they give the unfortunate sufferers ample compensation. We hold that the rule is fair and wholesome. Recent catastrophes will not dispose the public to reduce the just responsibility of the companies.—*English paper.*

THE COURT IN A FOG.—Last week Mr. Justice Blackburn reprimanded the usher of the Court for opening or not opening the windows on foggy mornings, and subsequently told persons with coughs to leave the Court. Likely enough clergymen would be glad to order coughers to leave the church if they had the authority to do so. The learned judge ordered the gas to be put out, which resulted in partial poisoning, as the gas could not be turned off as soon as it was put out. Upon candles being called for, the usher informed the Court that there were only two candlesticks, which the judge shared with counsel. It did not occur to the usher to invest twopence in potatoes and extemporise candlesticks. When the new Law Courts are built there will be no more discomfort for lawyers or suitors. And when will the new Law Courts be built? Perhaps our great-grandchildren may see them commenced.—*English Paper.*

PAYMENT OF EXECUTORS.

DIARY FOR MAY.

1. Mon. *St. Philip and St. James.* Last day for County Treasurer to make up books and enter arrears, and to make yearly settlement. Last day for apportionment of Gram. and Com. Sch. fund.
6. Sat. *St. John.*
7. SUN. *4th Sunday after Easter.*
11. Thur. Examination of Law Students for call to the Bar with Honors.
12. Frid. Examination of Law Students for call to the Bar.
13. Sat. Examination of Articled Clerks for certificates of fitness.
14. SUN. *Rogation Sunday.*
15. Mon. Easter Term begins. Articled Clerks going up for interim-examination to file certificates.
17. Wed. Interim-examination of Law Students and Articled Clerks.
18. Thur. *Ascension Day.* Last day for service for County Courts except York.
19. Frid. Paper Day, Q. B. New Trial Day, C. P.
20. Sat. Paper Day, C. P. New Trial Day, Q. B.
21. SUN. *Sunday after Ascension.*
22. Mon. Paper Day, Q. B. New Trial Day, C. P.
23. Tues. Paper Day, C. P. New Trial Day, Q. B.
24. Wed. Paper Day, Q. B. New Trial Day, C. P.
25. Thur. Paper Day, C. P. Open Day, Q. B.
26. Frid. New Trial Day, Q. B. Open Day, C. P.
27. Sat. Open Day.
28. SUN. *Whit Sunday.*
29. Mon. Paper Day, Q. B. New Trial Day, C. P. Declare for County Courts except York.
30. Tues. New Trial Day, Q. B. Paper Day, C. P.
31. Wed. Open Day, Q. B. New Trial Day, C. P.

THE

Canada Law Journal.

MAY, 1871.

PAYMENT OF EXECUTORS.

THIRD PAPER.

IV. *Privilege of executors and preference accorded to their compensation.*—In England a trustee and an executor will be allowed his expenses, even though he has a legacy as a reward for his trouble: *Wilkinson v. Wilkinson*, 2 Sim. & St. 287. In the case of an East Indian estate, where the executor had a legacy for his trouble, he was held disentitled to any commission; and he was not allowed, after a lapse of time, during which he had dealt in a contrary manner, to renounce his legacy and claim the usual compensation: *Freeman v. Fairlie*, 3 Mer. 24; see *Cockerell v. Barber*, 1 Sim. 28. In accord with this is the rule of the New York Revised Statutes, where it is laid down that when a provision shall be made by any will for specific compensation to an executor, the same shall be deemed a full satisfaction for his services in lieu of the statutory allowance, unless the executor shall renounce in writing all claim to the legacy: Tit. 8, Part ii, cap. 6, sec. 66. This rule has not been observed in this country; on the

contrary, in *Denison v. Denison*, 17 Gr. 311, it is said that the executor being here entitled to compensation for his services, his acceptance of a legacy by way of compensation does not bar his right to further compensation in a proper case, where it is made to appear that the amount bequeathed is not a fair and reasonable allowance within the meaning of the statute; but if it is a sufficient compensation, then nothing more should be allowed.

Further, the executor is privileged to receive his commission before debts are paid; and in case of a deficiency of assets, he is to be preferred to all the creditors of the estate. This is upon the ground, that the allowance is for services which form part of the expense incurred in administering the estate, forming, therefore, a primary charge upon the assets before the payment of debts: *Harrison v. Patterson*, 11 Gr. 105, 112. It was held in *Anderson v. Dougall*, 15 Gr. 405, that a legacy by way of compensation to executors, though larger in amount than the sum which the court would have awarded for compensation, was entitled to priority over legacies which were mere bounties; and this for the reason that in cases of deficiency of assets, legacies for which there is valuable consideration are entitled to rank before others which are mere matters of bounty. This decision is, however, only applicable to cases in which the will in question has been made or republished after the passing of the statute giving the right to compensation.

V. *Right of compensation, and manner of allowing and apportioning the same.*

In the earliest case under the statute—*McLennan v. Heward*, 9 Gr. 279—it was held that, generally speaking, five per cent. was a fair commission to be allowed on all moneys collected and paid over, or properly applied; but that on all moneys received and paid over only under the compulsion of the decree in the administration suit (however honest the contention as to liability therefor may have been), no more than two-and-a-half per cent. should be allowed.

In fixing the quantum of allowance, regard should be had to the size of the estate, the care, judgment and circumspection required and exercised in its management, and the length of time over which the supervision extends: *Denison v. Denison*, 17 Gr. 310. Although the duties do not involve much

PAYMENT OF EXECUTORS—THE BENCHERS OF THE LAW SOCIETY.

manual or physical labour, and although a clerk has been employed, yet if they require and cause anxiety and watchfulness, skill and exactness, good judgment and honesty, all of which are rendered, then the allowance should be liberal: *Per Vankoughnet, C.*, in *Proudfoot v. Tiffany*, cited in *Denison v. Denison*, 17 Gr. at p. 811. See *Matthews v. Bagshard*, 15 Jur. 977.

The present Chancellor has laid it down that regard should be had to the amounts passing through the executors' hands. In fixing the poundage payable to sheriffs on levying moneys under execution, the courts, both of common law and equity, have considered the amounts a proper element of consideration, allowing the maximum percentage on small sums, and reducing the scale as the amount increases. This is a principle which may well be applied to executors' compensation. In the case in hand before the court, where it appeared that the estate was very large, and where there was no evidence of any particular trouble in the management, it was deemed reasonable to allow, for collecting and investing moneys upon mortgage up to \$600, five per cent.; and for sums above that amount, three per cent. was thought sufficient: *Thompson v. Freeman*, 15 Gr. 384. In *Bald v. Thompson*, 17 Gr. 154, five per cent. was allowed on the purchase money, principal and interest, of lands collected; and it was said that in a special case, the executor might be allowed more for effecting sales of the property. In *Whisholm v. Bernard*, 10 Gr. 479, it was remarked by the court that five per cent. on moneys passing through the hands of the executor may or may not be an adequate compensation, or may be too much, according to circumstances. There may be very little money got in, and a great deal of labour, anxiety and time spent in managing an estate, where five per cent. would be a very insufficient allowance.

Thompson v. Freeman also lays down the principle that if the executor deals with the estate and settles claims in such a way that the sums upon which the commission is claimed do not actually pass through his hands, then the remuneration should be fixed, not by a percentage, but by a compensation commensurate to the labour, care and anxiety involved. See, upon this head, *Campbell v. Campbell*, 2 Y. & Coll. C. C. 607.

Where there are several executors, the one

upon whom the chief burden of management rests may be entitled to twice as much compensation as his co-executor, and it will be left to the Master to apportion the commission among the recipients as they severally deserve: *Denison v. Denison*, 17 Gr. 811.

When the services extend over a considerable period, the commission should be allowed from time to time as earned, and credited thus upon the accounts, so as to reduce *pro tanto* the interest and perhaps the principal chargeable against the executor. If the account is not taken in this way, which is the strictly correct mode, then in some cases interest may be allowed upon the commission: *Denison v. Denison*.

After the Master has fixed the executor's remuneration, the court are very slow to interfere with his finding, unless he has been wrong in principle, or has been manifestly exorbitant or inadequate in his allowance. The general rule is—as laid down in *Knott v. Cutler*, 16 Jur. 754, S. C. 16 Beav.—that the quantum being entirely in the officer's discretion, the court will not entertain an appeal therefrom.

THE BENCHERS OF THE LAW SOCIETY.

After a laborious investigation on the part of the scrutineers, the following members of the Law Society, of the degree of Barrister-at-Law, have been declared elected Benchers, under the recent Act:

J. D. ARMOUR, Q.C.	Cobourg.
H. C. R. BRODER, Q.C.	London.
JOHN BELL, Q.C.	Belleville.
T. M. BENSON	Port Hope.
EDWARD BLAKE, Q.C.	Toronto.
G. W. BURTON, Q.C.	Hamilton.
M. C. CAMERON, Q.C.	Toronto.
JOHN CRAWFORD, Q.C.	Toronto.
JOHN CRICKMORE, Q.C.	Toronto.
ADAM CROOKS, Q.C.	Toronto.
S. B. FREEMAN, Q.C.	Hamilton.
R. A. HARRISON, Q.C.	Toronto.
ROBERT LEES	Ottawa.
J. B. LEWIS, Q.C.	Ottawa.
W. R. MEREDITH	London.
RICHARD MILLER, Q.C.	St. Catharines.
THOMAS MOSS	Toronto.
D. MCCARTHY	Barrie.
ROLLAND McDONALD, Q.C.	St. Catharines.
K. McKENZIE, Q.C.	Toronto.
DR. MCMICHAEL	Toronto.
JAMES O'REILLY, Q.C.	Kingston.

THE BENCHERS OF THE LAW SOCIETY—ELECTION PETITIONS.

MILES O'REILLY, Q.C.	Hamilton.
GEORGE PALMER.....	Guelph.
T. B. PARDEE.....	Sarnia.
C. S. PATTERSON.....	Toronto.
ALBERT PRINCE, Q.C.....	Windsor.
D. B. READ, Q.C.....	Toronto.
S. RICHARDS, Q.C.....	Toronto.
J. S. SINGLAIR.....	Goderich.

On analysing this list, so far as locality is concerned, we find that twelve of the thirty reside at Toronto, twelve west of Toronto (including Barrie and St. Catharines), and six to the east. This division is curiously equal, when we remember that six out of seven of the *ex officio* Benchers also come from the east. Twenty of the new Benchers are Queen's Counsel, and nineteen were Benchers under the old *regime*, though two of these declined the nomination, and one had resigned his seat.

The highest name on the list was that of Mr. Becher, of London, a compliment from the profession at large, which cannot but be gratifying to him. The first ten names were, we understand, somewhat in the following order: Messrs. Becher, Patterson, Moss, Read, Harrison, Armour, Crooks, Bell, Richards and Pardee. There were over one hundred and fifty Barristers, who received votes in numbers graduating from nearly four hundred down to one.

Of those who were not elected, but who appeared prominently on the lists circulated before the election, we may mention that, owing to some informality, the names of Mr. Henderson of Kingston, and Mr. Wood of Brantford, were not on the list, and were declared ineligible. We have already stated that the County Judges, and several of the officers of the Courts who do not pay bar fees, were also held ineligible. Others, such as Mr. Robinson, Mr. Leith, &c., being in receipt of salaries from the Society, were not considered and did not look upon themselves as in a position to receive a nomination for the Bench. Mr. Moss, however, had, we understand, signified his intention of giving up his position as Examiner, his time being so occupied with other professional duties.

It will be observed that a fair share of young blood has been infused; but though there have been many changes in the *personnel* of the Bench, many of the most prominent Benchers under the old law will again sit in

convocation; and the fact that there is such a large proportion of silk gowns—exactly two-thirds of the whole—speaks well for the desire on the part of the profession to confide their interests to the seniors, and those whom a responsible government has thought most deserving of eminence.

Upon the whole, without, of course, having as yet had time to test the working of the new Act—for it is not the first, nor perhaps even the second election that may show any defects in the system—we may say, at least, that the first election under it has returned a very satisfactory Bench. With confidence, then, in those who have now been appointed by their fellows, let us hope the best for the future.

ELECTION PETITIONS.

The judges will soon be engaged in duties entirely new to them—taking evidence under the recent Acts respecting controverted elections, and reporting the result of their labours to the House of Assembly.

The law though new here is not so in England, as any reader of the English Reports will know. But there are some differences in the Statutes of the two countries which we may have occasion hereafter to refer to in connection with other matters of interest on the subject of these trials. At present, however, we must content ourselves with alluding to a prevalent rumour as to the time when these trials are likely to take place.

It is said that the trials will take place during the coming Term, the two Chief Justices and the Chancellor, if he should be here at the time, or, in case of his absence, one of the Vice-Chancellors, dividing the contested election cases between them.

Than the chiefs of the three courts no more fitting Judges could be chosen to inaugurate the new system, and that they will do their duty without fear, favor or affection, there will be none to doubt. But it has been suggested that it will be undesirable that the two Common Law Courts should be deprived of their heads during what is generally the heaviest Term of the year, and there is certainly a feeling against such an arrangement in the minds of the profession. It is easy to see that the public business would suffer by any diminution in the number of Judges,

ENGLISH LAW REPORTS DIGEST.

particularly when it may happen, as has often happened before, that one of the Judges may be incapacitated from business by sickness or other causes, and we all feel that such a contingency is not improbable with the amount of labour they have to undergo. Again, each petition will absorb at least two if not more of the leading counsel, and this will take from Term business (if, as is probable there will be, three trials going on at once), from six to ten of those whom clients depend upon in a most important part of their suits. Of course this is all written on the supposition that such an arrangement is contemplated, which may not be the case. Nor do we anticipate that the Judges will take any course but the most advisable under all the circumstances.

There are now eighteen petitions presented, and the trials will take a long time. In one case it is said that there will be nearly two hundred witnesses on each side, though this may be doubted. The consideration of these matters points to the oft repeated suggestions that the number of Judges might with advantage be increased. Mr. Dalton's appointment was a great relief, but if there is to be anything of a periodical crop of election petitions an addition will be a necessity. If Mr. Dalton was given full powers as a Judge by the Dominion Government all that is at present required would be gained. We trust the executive will relieve the Judges from a great deal of manual labour in these cases, and save much of their valuable time by employing for them short-hand reporters, as is done in England.

ENGLISH LAW REPORTS DIGEST.

There seems to be but one opinion as to the value of the Digest of the Law Reports. The *Solicitors' Journal* says, "It is next to impossible to find any thing in it." A correspondent of the *English Law Journal* thus feelingly speaks on the subject:—

"I have often occasion to refer to this book as well as other digests; and so unskilfully is the Council's book executed, that I find the book a perfect nuisance and source of irritation. The thing is a chaos. The authors in preparing it seem to have laboured under a complete derangement of legal ideas of order. When I refer to this 'Digest' I can seldom find the subject I want without first looking under several heads. I will give my last example. A client asked my advice

on a claim he had against a person who had sold him the goodwill of a trading business, and who had misrepresented the extent of his trade as being greater than it really was. I have the *Law Journal Digests*, Harrison's, Fisher's, Evans', and that issued by the Council, which unluckily was the first I could lay my hand upon. I looked at the word 'Deceit,' where I found nothing to the point, and indeed only one case noted, namely, 'Action against company for. See Contract for Shares.' I turned to "Fraudulent Misrepresentation," and found only one case (also not to my purpose), namely, 'Measure of Damages,' being a case of a cow which was not free from infectious disease. I referred to 'False Representation,' where, again, I found one case only, being one as to 'Effect of Bankruptcy upon Right of Action for.' I looked for 'Case,' but there was no such title. At last I looked for 'Goodwill,' and probably you may say 'Why on earth did you not look for "Goodwill" at first?' I can only reply, that when I learned my business, digests were arranged under regular heads, such as I have mentioned above, and I suppose by long habit and association of ideas my thoughts marshalled themselves after the same manner; and therefore from habit I pursued my researches in the way I have indicated; and, moreover, although my client's business related to 'Goodwill,' the questions in my mind might just as well have related to 'Good Digest,' or good anything else.

"After all, Mr. Editor, you must not condemn my method of looking out cases; for when I looked at 'Goodwill,' the 'Digest' referred me to 'Sale of Goodwill.' and, on referring to the last-mentioned title, I found one case noted, which, so far as the 'Digest' informs us, did not decide any point relating to goodwill."

In fact the system adopted, if such it could be called, is to put cases under titles where a layman might look for them, but a lawyer never. The Law Reports, though admirable in their way, have their defects, especially as to the digests, and it yet remains to be proved that they are entitled from their excellence to supersede, which as yet they have by no means done, the excellent reports given in the volumes of reports published in connection with such publications as the *Law Times*, the *Solicitors' Journal*, and the *Law Journal*.

The Assize business throughout the country has been light so far, partly owing to the general prosperity, and partly to the election having disturbed the current of litigation.

SIR JOHN STUART—CRITERIA OF PARTNERSHIP.

SELECTIONS.

SIR JOHN STUART.

We are compelled at times to discharge the painful duty of publishing memoirs of worthy judges and lawyers whom death has removed from their spheres of action. On the present occasion we are more fortunate. To write some few eulogistic words concerning Sir John Stuart upon his retirement from the bench in a ripe age, yet in the vigour of his mind and body, is a happy obligation, and the only drawback on our pleasure is the fear of not doing justice to our subject. We regret his departure from Lincoln's Inn, but there is one class of persons to whom his resignation will bring joy and gladness. These are the usurers, the extortioners, the fraudulent trustees, who dreaded a bill in Vice-Chancellor Stuart's Court with inexpressible horror, knowing the revelation that awaited their most skilful combinations, and the biting censure which would know into the remnant of their withered conscience. Other judges have attempted to emulate Sir John in this respect, but not with equal success. Their castigation has been too rough and ready, and they have melted the gold out of the ore by administering the process to the wrong objects. When Sir John Stuart branded a man as guilty of knavery, it did not happen that the Court of Appeal pronounced the same person to be honest.

When the bar assembled on Saturday last to bid farewell to Sir John Stuart at the close of the sittings of his Court, the intention was not so much to declare him a great judge, as to mark their sense of his high and noble character, his integrity, his gentlemanly demeanour, his courtesy to the bar. There was something wonderfully fine in his faith in the dignity of an English judge. Sir John was above anything like empty personal pride and vanity, but he had an extraordinary belief in the honour of his office, and deemed it one of the first duties to sustain and, if possible, enhance that honour. His peculiar adherence to an ancient and imposing style of dress on the bench was an outward emblem of the sentiment which reigned within him. His authority in Court was assisted by this feeling. While he gave attention to the junior members of the bar in a way which encouraged them to reward him by industrious research and proper preparation of their arguments, he possessed the important faculty of knowing how to check the exuberant audacity of senior members whom prolonged familiarity with the Court might tempt to forgetfulness of its dignity. He was also a good friend to the reporters. He delivered his judgments clearly audibly and precisely. Knowing that judgments were of no value except when reported, he so spoke as to render it easy to record what he said, and thereby set an example which merits imitation in Lincoln's Inn.

His career at the bar and on the bench

extended over a vast period of time. It is a huge stride from November 23, 1819, to March 25, 1871, and yet during all those years Sir John was an advocate or a judge. Fifty-two years of Courts prove a robust frame and a robust mind; and the love of country and country sports, skill with the rod and skill with the gun, go far to explain the immensity of his physical power. For twenty years Sir John practised at the junior bar. In March 1839 he was appointed Queen's Counsel, and in 1852 he was elevated, on the death of Sir James Parker, to the Bench. This nineteen year's tenure of office finds its record in three volumes of Smale and Giffard's Reports, in the LAW JOURNAL, and in the Law Reports. But in proportion to the work accomplished by him during those years the number of reported cases is not large. The first reported case was *Fiott v. Mullins*, 1 S. & G. 1., and was decided by him on the day on which he took his seat as a judge at the commencement of Michaelmas Term 1852.

Sir John Stuart was sworn on Her Majesty's Privy Council on Friday last. This mark of honour was his due, but Sir John has well earned his leisure, and cannot be expected to serve on the Judicial Committee.—*Law Jour.*

CRITERIA OF PARTNERSHIP.

(From the American Law Register.)

Although a distinguished writer discourages any attempt to determine questions of partnership by reference to common principles, yet it will hardly be denied that the tendency of recent adjudications lies unmistakably in that direction. The doctrine of *Grace v. Smith*, 2 W. Bl. 998, affirmed in *Waugh v. Carter*, 2 H. Bl. 235 and in many subsequent decisions, has been emphatically overruled, and the arbitrary notion that a mere participation in the profits of an undertaking or business created a partnership liability as to third persons, has been superseded by the adoption of a new criterion involving the principle of agency: *Cox v. Hickman*, 8 H. L. C. 268; *Bullen v. Sharp*, L. R. 1 C. P. 85.

Still, it may be doubted even now, whether these decisions furnish a rule of general application and utility. For if, as Lord Wensleydale observed in *Cox v. Hickman*, "the maxim that he who takes the profits ought to bear the loss, is only the consequence and not the cause why a man is made liable as a partner," it might, at least, with some semblance of reason, be said that the mutual relation of principal and agent results from the fact of partnerships, which is first to be proved, but does not give existence in that fact. "I do not think it proper for us to inquire," said Mr. Justice Blackburn in *Bullen v. Sharp*, "whether this rule of law is more or less expedient than the rule laid down in *Waugh v. Carter*. This is a question for the legislature, who may alter the law as to them

CRITERIA OF PARTNERSHIP.

seems best." And subsequently the statute 28 & 29 Vict. c. 86 was enacted, sanctioning the *ratio decidendi* of *Cox v. Hickman*, and defining specifically what conditions should be held not to constitute the liability of a partner.

The want of scientific certainty and uniformity in the older resolutions on this subject, is doubtless the result of misdirected inquiry as to the perception of profits, instead of seeking out the actual contract of the parties as the true foundation of their liability. For a contract either express or implied, is in fact the only just criterion, whether we regard the intentions or the legal liability of the parties, and unless the circumstances of the case are such as to warrant the presumption or to prove the fact of an agreement, there can be no obligation because there is really nothing to originate it. A contract being thus the proper subject of investigation, we have no other guidance than that which is furnished by the doctrines of the common law. For, in the language of Mr. Parsons, "as a very large part of commercial business consists in forming and executing contracts which must be governed by the law of contracts generally—and this is a part of the common law—many of the principles applicable to partnership are the same as those which regulate the common transactions of men; and so far the law of partnership may be said to be founded upon the common law."

But is it true that *any* other principles than those which govern contracts generally ought to be applied in seeking to fix upon a person suspected of being a partner, a liability which he has not expressly undertaken? For as early as 1795, in a case where the partners were *known* to the creditor, it was said that "notwithstanding where the person bringing the action has looked to the faith of several partners, who are in business together, and has relied upon their joint credit, though but one only of the partners acted, the proof of the act of one shall charge them all; *yet it must be made out in an action at common law that such debt or contract was joint, before the other partners shall be charged*. For in assumpsit against several a joint debt or contract must be proved; otherwise the proof would not correspond with the declaration." Watson on Part. (ed. 1795), 59; Layfield's Case, 1 Salk. 202; 1 Esp. N. P. 267.

The cases in which the want of some definite and general test is most seriously felt, are those where there is no formal agreement among the parties to be partners, but where they do in fact contract to share a joint or common benefit, and there is a question whether the agreement, such as it is, actually constitutes them partners *inter se*.

In cases of secret, silent, dormant or unknown partners, who agree in the common characteristic of secrecy or concealment in respect to creditors of the firm, the only inquiry is as to the person, and not whether

he is a partner or not, for this he is already, *ex hypothesi*.

On the other hand, where a person so acts as to induce the belief that he is already jointly bound with those who seek and obtain the credit, as in the case of nominal, public or ostensible partners, it seems hardly necessary to call in aid the principle of agency in order to determine their liability. For example, if in the firm A., B. and C., A. and B. are acting partners, and C. a mere nominal partner, it would appear that C. is responsible to the partnership creditor, not because A. or B. may have contracted a debt as his agent, but because C., by appearing in the firm, addresses himself directly to the creditor who is thereupon authorized to clothe him with the full character of an original and immediate contractor. He is not a partner merely because A. or B. may subject him to a joint obligation with themselves, but because by knowingly permitting his name to appear in the firm, he thereby expressly constitutes himself a partner, or rather is estopped from denying that he is a partner, and thus *being* a partner any member of the firm may bind him as an agent. Here it is only necessary to prove that he was *knowingly* represented as a member of the firm, without reference to any agreement made with his copartners. But in the case of one suspected of being a partner, the proof is entirely different, and it is not only admissible but necessary to resort to the common law for the means of establishing the fact of partnership, which being done, the law-merchant comes in to supply the consequences of that relation.

Let us endeavor then to ascertain among the doctrines of the common law, the ultimate principle on which the joint liability of joint contractors is founded, and see if it may not be made serviceable in determining the partnership relation in respect to the creditor. For it must be remembered that we are now called upon to prove the fact of partnership, in the absence of any express agreement to that effect, and perhaps in the face of a denial made under the solemn sanction of an oath. It is therefore requisite to prove a *joint* liability between the party sought to be charged and the party or parties already known to be liable for the debt. And this can be done only by showing that the relations of all the parties to the creditor are identical.

The common law enables us to ascertain this identity of relation by the application of its most familiar elementary principles.

And first there must be a contract.

It may be said generally that wherever the common law gives a remedy for enforcing the payment of money—except in actions *ex delicto*—the right to recover is predicated on the existence of a contract either express or implied. In actions of debt, covenant and assumpsit, it is absolutely indispensable to prove that the parties agreed together either in formal terms or by intendment of law.

CRITERIA OF PARTNERSHIP.

before the defendant shall be required to disprove the allegations of the plaintiff. And certainly because a man is supposed or charged to be a partner, there is no reason either in law or in justice to subject him to harder conditions than those which obtain in ordinary cases, so as to render him liable on a contract which as to him has no existence either actual or presumptive.

Having established the contract (supposing a consideration proven) the question next in importance is, who are answerable for its fulfilment, or rather for damages in default of its fulfilment, in other words, who are properly defendants to the action? And here it is manifest that no one ought to be made a defendant who was not a party to the contract either in person or by representation lawfully authorized. Where the contract is *express*, there is no difficulty in determining the question; but where it is implied, it is necessary to ascertain where the *legal liability* rests, for where this is found, then the presence of a contract is presumed. But no one can enforce this liability to whom it is not *directly* given, for "it is a general rule that no person can maintain this action (assumpsit) on an agreement to which he is not a party, for in such case there can be no contract express or implied," 1 Str. 592. Nor is there any magic virtue in the *lex mercatoria*, which can convert a stranger into a party simply because he happens to be called a partner by those whose interest it is to prove that he is such.

The real question then is, did the supposed partner contract with the partnership creditor? and in the absence of any express agreement, the law will infer a contract from certain facts and circumstances.

When A. at his request, either express or implied, obtains the goods of C. without agreeing as to the price or actually promising to pay it, the law imposes on him the obligation of a contract to pay so much as they are worth, and the ground of his liability is the benefit to himself and the corresponding detriment to C. The same is true if A. and B. obtain goods in a similar manner, each one at common law being liable for the whole debt, with the right of demanding contribution.

But the benefit must move *immediately* from C. to A. or to A. and B., and not through an intermediate interest or title, for otherwise the assumpsit cannot be implied, but must be expressly given. For instance, if A. assumes the responsibility of a debt contracted by B., for B.'s benefit, the law can raise no implied undertaking from A. to the creditor, whatever may be the consideration as between A. and B., but goes so far as to require that the promise shall be in writing. The liability of the guarantor is essentially different from that of the principal debtor, and depends upon a totally different principle. For here in fact are two contracts; the debtor's contract to

pay for the goods, and the guarantor's undertaking to pay the debt in default of payment by the principal debtor. As to the contract *to pay for the goods*, there is no privity between the guarantor and the creditor, and the only effect of the statute 29 Car. II. c. 8 is that such collateral agreements are now required to be in writing, in order that the guarantee may be more readily proven, but it does not merge the two contracts into one.

So if A. purchases goods on credit and then gives or sells them to B., although the latter has the use and benefit of the property so obtained, yet the creditor cannot go around his immediate debtor and charge the debt upon a stranger, because here is an intermediate title or ownership, and there is *ex vi terminorum*, no privity and consequently no contract between the stranger and the creditor.

The ground of the implied contract is therefore the benefit drawn *directly* from the use of the goods or property purchased, which property has been received *immediately* from the creditor in such a manner as to create a privity of relationship between the debtor and himself; and what is true of one, holds equally good of any number of debtors.

This general reasoning is applicable to all cases of supposed partnership, where an attempt is made to extend the liability beyond its ostensible limits. The problem with the defence is to fix the point at which the liability ceases, for it must cease when no contract can be legally presumed as proven to exist, and if it can be shown to fall short of the person sought to be charged by being intercepted in some intermediate party, it follows necessarily that the former cannot be affected by it.

(To be continued)

A Chicago legal paper says that "a case was recently decided in Illinois upon the question of admitting atheists as witnesses in court. The testimony of a well-to-do merchant of that neighborhood was objected to on the ground that the witness was an atheist. This the witness admitted, but affirmed at the same time that he considered an oath binding on him. The judge decided that, under the constitution, no one could be denied any civil right or privilege on account of his religious opinions." A contemporary remarks that they would have thought the objection was that the witness had no religious opinions.

LEGAL APHORISMS.—The defendant's counsel, in a breach-of-promise suit, having argued that the woman had a lucky escape from one who had proved so inconsistent, the judge remarked that "what the woman loses is the man as he ought to be." Afterward, when there was a debate as to the advisability of a marriage between a man of 49 and a girl of 20, his lordship remarked that "a man is as old as he feels; a woman as old as she looks.—*Bench and Bar*."

C. L. Cham.]

THE QUEEN V. PATTEE.

[C. L. Cham.]

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law.)

THE QUEEN V. PATTEE.

Sci. fa. to repeal a patent—Fiat of Attorney General—Who to grant.

A *sci. fa.* to set aside a patent was issued at the instance of a private relator without the fiat of either the Attorney General of the Dominion or of Ontario having been first obtained.

Held, 1. That a fiat was necessary.

2. That the Attorney General of Ontario was the proper authority to grant the fiat in such a case.

[Chambers, January 5, 1871.—Mr. Dalton.]

A writ of *sci. fa.* was issued at the instance of John Lough, to set aside a patent, granted on the 12th August, 1870, to Gordon Burleigh Pattee; on the ground that the patent was contrary to law, in that Pattee was not the first and true inventor of the invention, for reasons which it is unnecessary to state at length.

Certain proceedings were taken on this writ, the regularity of which was questioned; and finally the defendant obtained a summons calling on John Lough, the relator in this case, and the Attorney-General for Canada, to show cause why the writ of *sci. fa.* in this cause, and the service thereof, and declaration, and rule to plead, should not be set aside on the ground, amongst others, that no fiat of the Attorney-General for Canada, or of the Attorney-General for Ontario, was filed before the issue of said writ, or at any time since, and that said writ issued without authority, and that all subsequent proceedings in this cause have been had without proper authority therefor; or why all further proceedings in this cause should not be stayed until a fiat or warrant of the Attorney-General shall have been filed authorizing the proceedings in this cause.

R. A. Harrison, Q. C., for the relator, John Lough, showed cause.

S. Richards, Q. C., for the defendant, supported the summons.

G. Robinson, Q. C., appeared for the Attorney-General of the Dominion.

MR. DALTON.—In the opinion which I have come to, it is not necessary to detail minutely the proceedings. I will assume that there has been an appearance in the suit, or what justified the plaintiff in supposing that there was an appearance. As soon as conveniently could be, after discovering that no fiat of the Attorney-General had been obtained, and without any further step in the defence, the defendant has moved to set aside the *scire facias*. I think that, for such a cause, which goes to the authority for the whole proceeding, he has a right to move, at almost any stage, upon first discovering the defect of authority; and I do not imagine that anything would take away that right but the acquiescence of the defendant himself, either express or implied, which must of course be after he had become aware of the want of authority.

There are two important questions:—first, is a fiat necessary? and, secondly, if so, by what authority should it be granted?

Before the statute of Canada, 1869, cap. 11, the books and the actual practice shew that a fiat was necessary. By the Consolidated Act of Canada, cap. 34, the proceedings to be had upon the writ of *scire facias* were directed to be according to the law and practice of the Court of Queen's Bench in England; and Con. Stat. U. C. cap. 21, sec. 14, also makes the fiat necessary. By the English practice, not only is it necessary to the institution of proceedings, but the Attorney-General has the control of the case throughout, and may at any time enter a *nolle prosequi*: Hindmarsh, 896.

But Mr. Harrison contends that section 29 of the Act of 1869 supersedes the former statutes and practice, and is now in itself the complete enactment we must look to, as to this remedy by *scire facias*; and it was with this belief that he issued the present writ without a fiat. That section enacts that any person desiring to impeach a patent may obtain a sealed and certified copy of the patent, and of the petition, &c., and may have the same filed in the particular court according to his domicile, which court shall adjudicate on the matter, and decide as to costs; that the patent, &c., shall then be held as of record in such court, so that a writ of *scire facias* under the seal of the court, grounded upon such record, may issue for the repeal of the patent for legal cause, if upon proceedings had upon the writ the patent shall be adjudged void.

Now Mr. Harrison contends that this clause supersedes the old law, and gives the absolute right to any person desiring to impeach a patent to issue and proceed upon a *scire facias* without the leave of any one; and he instances several known proceedings where the name of the Queen is used by a private prosecutor as of course.

Mr. Richards, on the other hand, contends that the short terms in which the *scire facias* is mentioned, are used with reference to the known practice as to such a writ, existing at the time when the Act was passed, and that the process is therefore subject to all the old established conditions.

By the use of the name of the Queen, the prosecutor is placed in this position of advantage: he cannot be subjected to a *non-pros.*; he cannot be non-suited; the defendant cannot demur to evidence; it is doubtful whether a bill of exceptions will lie to the charge of the judge; if the defendant obtains judgment, he is not entitled to costs; and—what strikes me as more important still—the prosecutor can go into the box and establish his own case as a witness, but the defendant in a Crown case cannot be examined in his own behalf. When it is considered that this proceeding is very often taken by a person who himself claims the right to the invention in the patent he is attacking, it certainly seems a peculiar state of things that one of the rival claimants can be a witness and the other cannot.

The fiat is not a mere form, then, but a matter of substance; and it is very necessary that some authority should exist to control the exercise of the power which it confers, and to guard against its abuse.

C. L. Cham.]

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[C. L. Cham.]

Now, the 29th section of the Act of 1869 does not, it seems to me, give the person desiring to impeach a patent the right to issue a *scire facias*; it certainly does not do so in terms. It gives him the right to record the patent, "so that a writ of *scire facias* may issue for the repeal of the patent." But on whose authority is it to issue? As the clause does not expressly say that he may do it, and it is not only formally but substantially a suit of the Queen, it seems to follow, even without regard to the previous known practice, that it can only be on the authority of the Attorney-General that the writ is to issue. So that I agree with Mr. Richards. Consistent with this is the repealing clause of the act of 1869. It repeals cap. 34 only in so far "as it may be inconsistent with this Act." Now, the provision of sec. 20 of cap. 34, that the proceedings upon the *scire facias* shall be "according to the practice of the Court of Queen's Bench in England," is not inconsistent with the Act of 1869, but in furtherance of it. Therefore, whether Mr. Harrison is right or not in contending that cap. 21, Con. Stat. U. C. is inapplicable to a patent issued under the Act of 1869 because it is not issued under the great seal, I think a fiat was necessary for this writ of *scire facias*.

But whose fiat?

It may provoke a smile that an officer of the court, in deciding a matter of practice, should incidentally consider a question under our constitution, which is of some importance in itself, and is a part of larger questions. It is of little matter, however, where it may begin; it must come to the decision of the court. I was told, when I suggested the question on the argument, that it was very doubtful whether the Minister of Justice or the Attorney-General for Ontario be the proper authority to grant a fiat in such a case. I must therefore suppose it is doubtful, though I myself cannot see the grounds for doubt. I cannot think that two authorities exist, either of whom may grant it. Some one authority, and one only, must answer here the position of the Attorney-General in England in respect of this matter.

The British North America Act, section 92, enacts that, "In each Province the Legislature may exclusively make laws in relation to matters coming within the class of subjects next hereinafter enumerated, that is to say [after twelve other heads], 13, Property and civil rights in the Province; 14, The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

These sections express the powers of the Legislature of Ontario.

Then as to the Executive, section 135 enacts, "that until the Legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities or authorities, at the passing of this Act vested in or imposed on the Attorney-General, Solicitor-General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver-General, by any law, statute or ordinance of Upper Canada, Lower

Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant-Governor for the discharge of the same or any of them." So that, as is consistent and natural, the executive and legislative functions of the Government of Ontario seem to be co-extensive.

The words of this statute have been well weighed. But what definition of "property and civil rights" can exclude the right of enforcing a civil remedy in the courts? To lawyers, that seems the practical proof and test of all right: without it, at any rate, no other right is of any real value. And further, there is attributed to the local jurisdiction, "the administration of justice in the Province, * * * including procedure in civil matters." Then if the legislative and executive powers as to "property and civil rights in this Province," and "the administration of justice," and as to "civil proceedings in the Courts," are in the Government of Ontario, can it be thought that any other authority is for the present purpose indicated, than that of an officer of Ontario responsible to its Legislature? For let it be borne in mind that he who has the discretion to grant has also the discretion to withhold, and that it is only by *scire facias* that a subject in Ontario, aggrieved by a patent wrongly issued, can seek the remedy of its avoidance.

I desire not to amplify; but other reasons, in and out of the Act, point to the conclusion that the Attorney-General of Ontario is the authority that must grant or refuse the fiat which is necessary to the real plaintiff here to pursue this remedy. I shall not be understood as speaking of the case where the crown itself seeks to avoid a patent; I speak only of the present case, where a subject domiciled in Ontario seeks to avail himself of the peculiar privileges of the Crown to assert his own private interests.

I think the proper order is that, upon payment of the costs of this application, and filing a fiat of the Attorney-General of Ontario—which may be done *nunc pro tunc*—this summons be discharged. Upon failure to do this within two calendar months, that the writ and all proceedings be set aside with costs, to be paid by the relator.

Order accordingly.

WEAVER V. BURGESS ET AL.

Ejectment—Striking out defendant—Terms.

The name of a defendant, who disclaimed all interest in the land, except as dowress, struck out of the proceedings in ejectment.

[Chambers, Feb. 1, 1871—Mr. Dalton.]

A summons was obtained on behalf of Ann McWade, one of the defendants in an action of ejectment, calling on the plaintiff to shew cause why her name should not be struck out of the writ and proceedings in this cause, on the ground that she had no interest in the land in question except a right to dower, which had not been assigned to her.

O'Brien shewed cause:—

This summons must be discharged. This defendant is in possession, and the writ must therefore be directed to her. There is authority to strike out the name of a defendant who is a tenant, but not that of a dowress: *Kerr v. Waldie*,

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4 Prac. Rep. 138, is founded on two cases which, it is submitted, do not warrant the conclusion arrived at, and the leaning of the learned judge there is against the practice. The principal reason given is that a defendant who claims no interest becomes liable for costs; but here the applicant is a dowress, and claims a certain interest. If no judgment is obtained against her the plaintiff can not get possession. See *Peebles v. Lottridge*, 19 U. C. Q. B. 628; *Jones v. Seaton*, 26 U. C. Q. B. 166; *D'Arcy v. White*, 24 U. C. Q. B. 570; *Hall v. Yuill*, 2 Prac. Rep. 242; *Kerr v. Waldie*, 4 Prac. Rep. 138; 3 U. C. L. J. N. 8 292. *John Paterson*, contra, relied on *Kerr v. Waldie. ante*.

MR. DALTON.—I shall follow *Kerr v. Waldie*. I can see no difference in the position of a dowress and a tenant. But I can only make the order upon this defendant undertaking to be bound by the final judgment in the case, so far as possession is concerned, as though her name had not been struck out, and the order as to costs will be the same as in *Kerr v. Waldie*.

COUNTY COURT OF NORFOLK.

(Reported by HENRY ELLIS, ESQ., Barrister-at-Law.)

CLEMENS QUI TAM V. BEMER.

Returns of convictions—C. S. U. C. cap. 124—How affected by the Law Reform Act of 1868, and by 32-33 Vic. caps. 31 & 36.

Returns of convictions and fines for criminal offences being governed by the Dominion statute 32-33 Vic. cap. 31, sec. 76, and not by the Law Reform Act of 1868, are only required to be made semi-annually to the General Sessions of the Peace.

Semhle, that the right to legislate upon this subject belongs to the Dominion Parliament, and is not conferred upon the Provincial Legislatures by the B. N. A. Act, 1867.

[St. Thomas—Hughes, Co. J.]

This was a penal action, brought against a magistrate for not returning a conviction.

The declaration alleged that, before and at the time of the trial and conviction thereafter mentioned, and from thence hitherto, the defendant was a justice of the peace in and for the said county of Elgin; and that theretofore, and subsequently to the 1st day of January, 1870, to wit, on the 5th day of February, 1870, the hearing of a certain charge and complaint against the now plaintiff, for unlawfully assaulting and beating one Mary McLoud, and the trial of the now plaintiff upon the said charge and complaint, were duly had and took place within the said county of Elgin, before the now defendant, as and being such justice of the peace as aforesaid; and which trial and hearing were so had and took place under a certain law in force in this Province giving jurisdiction in the premises to the defendant as such justice; and at and upon such hearing and trial, and within the said county of Elgin, the now defendant, as and being such justice as aforesaid, duly and in due form of law convicted the now plaintiff of the said offence so charged as aforesaid; and upon and by such conviction, and within the said county, imposed upon the now plaintiff a certain fine and penalty of, to wit, twelve dollars, for the said offence; which said conviction took place before the second Tuesday in March, 1870:

yet the defendant, so being such justice as aforesaid, did not on or before the second Tuesday in the month of March, in the year last aforesaid, make to the clerk of the peace of the said county of Elgin a return of such conviction, or of such fine or penalty, in writing under his hand in the form or to the effect prescribed by the statutes in that behalf, or any return thereof whatsoever, on or before the said second Tuesday in the month of March, in the year aforesaid; but wholly refused and neglected so to do, although a reasonable time after such conviction, for making any and every such return as aforesaid, had elapsed before the said second Tuesday in the month of March, in the year last aforesaid; contrary to the form of the statutes in such case made and provided: whereby, and by force of the said statutes, the now defendant forfeited for his said offence the sum of eighty dollars: and thereby, and by force of the said statutes, an action hath accrued to the plaintiff, who sues as aforesaid, to demand and have of and from the now defendant the said sum of eighty dollars; yet the defendant hath not paid the said sum of eighty dollars, or any part thereof. And the plaintiff claims, as well for himself as for our lady the Queen, eighty dollars.

The defendant pleaded not guilty by statute (21 James I. cap. 4, sec. 4), on which the plaintiff found issue.

A verdict was found for the plaintiff.

McDougall for the defendant, moved in arrest of judgment, on the ground that the declaration shewed no cause of action under C. S. U. C. cap. 124, and there was no proof of defendant having incurred a penalty under that or any other statute.

Kaine showed cause.

HUGHES, Co. J.—At the time of the trial of this cause, and at the argument of the rule nisi, I was strongly inclined to the view that the plaintiff had the right to maintain this action against the defendant, on the grounds that it was not in the province of the Dominion Parliament to repeal Con Stat. U. C. cap. 124, that being a statute not affecting the criminal law or criminal procedure; and that it was exclusively within the jurisdiction of the Provincial Parliament to alter, amend or repeal that statute, or substitute another in its place; because the fines referred to therein might affect the revenue of the Province, or of the municipalities therein, and it was merely passed to protect the Provincial revenue, by compelling minor magistrates, such as justices of the peace, who are appointed by the Provincial Government, to account for and pay over fines received by them under summary convictions. (*Vide* subsec. 15 of sec. 92, British North America Act, 1867.)

After a more attentive perusal of the British North America Act of 1867, I am induced to come to the opposite conclusion, and to view the matter differently. The intention of the Ontario Legislature, when passing the 4th subsection of the 9th section of the Law Reform Act of 1868 (in the absence of direct expression), may fairly be presumed to have been merely to so amend Con. Stat. U. C. cap. 124, as to relate to cases not criminal, or for enforcing any law of the Province made or to be made in relation to mat-

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ters coming within any of the classes of subjects enumerated in section 92 of the B. N. A. Act, 1867, over which the Provincial Legislature has exclusive jurisdiction to make laws

By the 14th subsection of section 92 of the B. N. A. Act, 1867, the administration of justice in the Provinces, including the constitution, maintenance and organization of Provincial courts, both of civil and criminal jurisdiction, is conferred upon the Provincial Legislature.

The declaration in this case sets forth that the conviction referred to, as made by the defendant, the return of which he ought to have made, was the imposition of a fine for an assault and battery; and inasmuch as that cannot be in any sense considered as what the statute means by "the administration of justice," it is in my opinion in every sense to be regarded as appertaining to the criminal law and the procedure in criminal matters. A summary proceeding before a justice of the peace is authorized for a common assault or battery (when it is requested by the prosecutor), i.e., for what would otherwise be triable by indictment as a misdemeanor and be ranked as a criminal offence. No authority other than the Dominion Parliament could deal with it. The procedure and forms for the prosecution and conviction of offenders in such cases are laid down, a return of the conviction by a given time is prescribed, and a certain consequence is to follow a neglect of making that return. We find the whole subject, from the complaint to the return of the conviction dealt with by the criminal Acts of 1869, passed by the Dominion Parliament (*Vide* 82-83 Vic. cap. 20, sec 43, and cap. 31.) I can only regard an assault and battery as a criminal offence, although triable summarily; and therefore, by the 27th subsection of the 91st section of the B. N. A. Act, 1867, anything connected with the prosecution or its consequences must belong to the exclusive authority of the Parliament of Canada, and could not be dealt with by the Provincial Parliament.

By the Law Reform Act of 1868 (sub-section 4 of section 9), the Con. Stat. U. C. cap 124, was only amended, not repealed: the returns of summary convictions and fines by justices of the peace were required to be made quarterly to the clerk of the peace, instead of to the Courts of General Sessions of the Peace. I therefore consider the reasonable construction to be placed on that amendment as expressive of the intention of the Legislature, to have been to confine the 4th subsection of the 91st section of the Law Reform Act of 1868 to convictions and fines for the classes of subjects enumerated in sub-section 16 of section 92 of the B. N. A. Act, 1867, as to cases, not criminal, over which the Provincial Legislature has control, and that that Legislature did not thereby assume to act beyond the scope of its powers, or to legislate concerning returns of convictions in criminal cases.

If it were competent for the Dominion Parliament to legislate concerning the summary trial of criminal offence, and lay down the procedure therefor, I apprehend it was also competent for them to deal with the return of the convictions and its results, to prescribe their legitimate conclusions, and to set or impose any penalty for non-observance of what was laid down. With that power, as a necessary consequence, must

follow the jurisdiction to alter, amend or repeal any existing law affecting the same subject, for the purpose of assimilating the criminal laws of the whole Dominion. I cannot therefore understand that the Dominion Legislature has jurisdiction over a given subject up to a certain point, and that the Provincial Legislature has the right to step in and begin legislation where the Dominion Parliament has left off. The jurisdiction to legislate and deal with any given subject must be entirely under the control of the one or the other, and not under the piecemeal authority of both. If it were otherwise, the statute law of the country would assume such a fragmentary character that in a few years we should find it difficult to wend our way through its perplexities.

By referring to the Dominion statute of 1869, 32, 33 Vic cap 86, schedule B, we find cap. 124 of the Con. Stat. U. C. wholly repealed, except section 7 (which section 7 relates to returns to be made by sheriffs): with this saving, however, in the second paragraph of section 1, "such (repeal) shall not extend to matters relating solely to subjects as to which the Provincial Legislatures have, under the B. N. A. Act, 1867, exclusive powers of legislation, or to any enactment of any such Legislature for enforcing, by fine, penalty or imprisonment, any law in relation to any such subject as last aforesaid." So that until the passing of 82 & 83 Vic. caps 31 and 36, by the Dominion Parliament, the Con. Stat. U. C. cap. 124, for all purposes of the subject in controversy in this suit, remained unrepealed and unchanged, in so far as any return of a conviction or fine for a criminal offence was concerned, or for any offence dealt with by the criminal law of the Dominion Parliament, or whereby the procedure in criminal matters was prescribed. None but the Dominion Parliament could amend, alter or repeal it, and that for all purposes set forth in the 16th subsection of the 92nd section of the B. N. A. Act, 1867; and as to any subject referred to in the second paragraph of section 1 of the Dominion statute 82 & 33 Vic. cap 86, the Con. Stat. U. C. cap. 124, and the Law Reform Act, 1868, remained unrepealed.

The Con. Stat. U. C. cap. 124, required the return of the conviction to be made to the next ensuing General Quarter Sessions of the Peace, and the 76th section of the Dominion statute, cap 31, prescribed that a return of convictions should be made by the justices of the peace to the next ensuing "General Sessions of the Peace;" and as the Law Reform Act, 1868, limited the number of sessions of the Court of General Sessions of the Peace to two in each year, instead of four, as formerly, I think the defendant was only bound by law to make a return to the General Sessions of the Peace next after the conviction, which would be the 14th day of June, 1870; and as the allegation in the declaration is that he did not make the return before the second Tuesday in March, 1870, and as there was no allegation made which would bring the case within the provisions of the Dominion statute of 1870, 33 Vic cap 27, sec 8, I think the judgment should be arrested.

The defendant was not bound to return the conviction or fine so soon as the second Tuesday

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of March, 1870, or before the 14th day of June, in that year.

But supposing the foregoing not to be the correct view of the respective powers of our Legislature, and supposing Con. Stat. U. C. cap. 124 not to be fitly classed with the criminal law or criminal procedure, then I should assume the position, that by the 91st section of the B. N. A. Act, 1867, general powers of legislation are conferred upon the Dominion Parliament, "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces;" and without restricting those general terms, it is therein declared, "for greater certainty," to what the exclusive legislative authority of the Parliament of Canada extends. I think, therefore, that by that general power, the Dominion Parliament had the exclusive right to alter, amend or repeal Con. Stat. U. C. cap. 124, and to substitute other enactments in its place; because there is no subsection of the 92nd section, under which it may be held that the exclusive power to legislate upon that subject is conferred upon the Provincial Legislatures; for I cannot see how it belongs to the subject of "property and civil rights" (subsec. 13), or to "the administration of justice" (subsec. 14), or "the imposition of punishment, by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matters coming within any of the classes of subjects enumerated in that section" (subsec. 15); nor is it concerning a matter of a merely local or private nature in the Province (subsec. 16). The rule to arrest the judgment must therefore be made absolute.

Rule absolute to arrest judgment.

ENGLISH REPORTS.

EXCHEQUER CHAMBER.

MAKIN V. WATKINSON.

Lessor and lessee—Covenant to repair—Notice to lessor of want of repair.

In an action by a lessee against his lessor for breach of covenant to repair the main timbers and roofs of the demised premises.

Held, that the lessee could not recover against the lessor for breach of covenant without having given him notice of repairs being required; that being a matter within the knowledge of the lessee, and not of the lessor (MARTIN, B., *dissentiente*).

(Nov. 22, 1870.—19 W. R. 286.)

Declaration—That defendant by deed let plaintiff a mill. Defendant covenanted to keep the main walls, main timbers, and roofs in repair, which he neglected to do, whereby plaintiff incurred great loss.

Third plea—That no notice was given by plaintiff to defendant of any want of repair, or that the main walls, main timbers, and roofs were not in good order.

Demurrer and joinder in demurrer.

Wills, for the defendant, contended that the plea was good, and that the plaintiff being the lessee, and having exclusive possession of the premises, was bound to give the lessor notice of any repairs that were required. He cited the case of *Moore v. Clark*, 5 Taunt. 96, where

Mansfield, C. J., and Gibbs, J., said the lessor may charge the lessee without notice, for the lessor is not on the spot to see the repairs wanting; the lessee is, and therefore the lessee cannot charge the lessor for breach of repairs without notice, for the lessor may not know that the repairs are necessary. He also cited *Harris v. Ferrand*, Hardres, 42, and *Vyse v. Wakefield*, 6 M. & W. 442, and contended that the defendant could not enter the premises to see what repairs were wanted, as there was no such right of entry reserved to him by the lease.

Kemplay, for the plaintiff, contended that the defendant had a clear right of entry on the premises to see what repairs were necessary in accordance with the maxim, *quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud*, Broom's Maxims, 5th ed. 485; and argued that as the knowledge of what repairs were wanted was not, or, at any rate, need not have been in the exclusive knowledge of the plaintiff, there was no necessity for any notice from the plaintiff, for which he cited *Cole's case*, Cro. Eliz., p. 97, where Anderson, C. J., says:—"If one be obliged to make such assurance as J. S. shall advise, he ought to take notice of the assurance advised at his peril, because a certain person is appointed to do it. But if it be such assurance as my counsel shall advise, I ought to give notice of the assurance, for he cannot take notice who is my counsel." He also cited *Coward v. Gregory*, 15 W. R. 170; L. R. 2 C. P. 158.

CHANNELL, B.—In my opinion this is a good plea. The declaration is good upon the face of it, and states in a compendious way that the defendant had been requested to repair. The question then is whether the plea is good. I agree that the observations which have been cited from the case of *Moore v. Clark*, 5 Taunt. 96, cannot be considered as more than *obiter dicta*, and that those observations do not carry the weight they would have borne had they been made with reference to any ascertained materials present to the mind of the Court; but looking at the case upon principle, I think that *Vyse v. Wakefield*, 6 M. & W. 442, is as authority for the doctrine that where a covenant is unreasonable or unconscionable, there you must supply words to make it reasonable and conscionable, although I quite agree that where a covenant is simply absurd, you cannot remedy that absurdity by introducing words which are not found there.

The covenant in this case was to repair the roof, and the main timbers. I might perhaps be possible for the defendant to ascertain the condition of the exterior portion of the roof without entering the premises; but it is clear that he could not ascertain the condition of the interior timbers without going into the premises, and I do not see that he had any power reserved to him by the lease to enter and view the condition of the premises. It appears to me, therefore, there being no authority against my view of the case, that the plea is good.

BRANWELL, B.—I think the plea is good, and, of course, to hold it good we must in effect insert the words "upon notice" in the covenant, and I agree that, as a general rule, it is objectionable to interpolate words in a contract which the parties themselves have not made use of.

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It seems to me to be clear that these two persons cannot say that they have entered into such an unreasonable covenant as this—that, although the one party is in possession of the premises, and the other party cannot enter to view the state of repairs, yet that the latter is to be bound at its peril to keep the premises in repair, though he have no notice of, and no means of knowing, the repairs that are wanted; and it is worth while remembering that this is an action to recover damages that have been caused by reason of the non-repair, and not merely to recover such amount of damages as would suffice to put the buildings in repair. In my opinion the parties did contemplate that the lessor should not be bound to repair until he had received notice from the lessee that repairs were necessary, and my opinion as to the necessity of such a notice is much strengthened by the *obiter dicta* of the two learned judges in the case of *Moore v. Clark*, 5 Taunt. 96.

The cases are by no means clear; some seem to incline one way and some the other. The case of *Fletcher v. Pynsett*, Cro. Jac. 102, was an action on a covenant to assure a copyhold to the plaintiff if he married the defendant's daughter; and in that case it was held that the plaintiff need not allege that he had given the father notice of the marriage having taken place, for the defendant was bound, at his peril, to take notice thereof. The true rule may be that where the happening of the particular event is in the exclusive knowledge of the plaintiff, the defendant being only able to guess or speculate as to what has happened, there the plaintiff is bound to give notice thereof. One always must have some doubt as to whether it is right to introduce words which the parties have not themselves made use of; but, for the reasons I have given, I think notice was required in this case.

MARTIN, B.—In my opinion this plea is bad; it seems to me that we differ very much as to what is good sense, and that to introduce words in order to give effect to what we suppose may be the meaning of the parties would give rise to great uncertainty. This is an action upon a covenant in a lease whereby the defendant undertook to maintain and keep the roof and the main walls and timbers of the demised premises in good repair at all times during the term. The only defence the defendant sets up in his plea is that he had no notice of the need of any such repairs, but as the lease is silent as to the necessity of any notice, the plea is, in my opinion, a bad one.

The case of *Yse v. Wakefield*, 6 M. & W. 442, has been relied on by the defendant; but to apply that decision to the present case it is necessary to assume that the defendant could not ascertain what repairs were wanted—an assumption which I am not prepared to make. Mr. Cowling, in arguing that case, stated the general rule of law correctly when he said that the general rule of law is that a party is not bound to do more than the terms of his contract oblige him to do, and if the different judgments be looked at it will be seen that they all confirm that rule, for Lord Abinger says that the rule to be collected from the cases seems to be this—that where a party stipulates to do a certain

thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the particular knowledge of the opposite party, then notice ought to be given him. So Baron Parke lays it down as a general rule that a party is not entitled to notice unless he has stipulated for it, but says that there are certain cases in which, from the very nature of the transaction, the law requires notice to be given, though not expressly stipulated for; and Baron Rolfe says, where the law casts an obligation upon a man it says that it shall be reasonable, but that is not so where a party contracts to do a particular act, for then it is his own fault for entering into such a contract. In my opinion, then, this is not a case in which notice is required, and I think the plaintiff is entitled to judgment.

Judgment for the defendant.

CHANCERY.

COLMER V. EDE.

Lien—Solicitor and client—Deeds delivered for a special purpose—General lien on—Mortgage—Foreclosure.

Deeds delivered to a solicitor for a specific purpose only are subject to a general lien for costs incurred previous to such delivery, unless such lien be limited by a special agreement.

Ex parte Sterling, 16 Ves. 258, followed.

[Dec. 19, 1870.—19 W. R. 318.]

This was a suit for foreclosure, which involved the question whether deeds which had been delivered to a solicitor for a specific purpose only (but without any special agreement), were subject to a general lien for costs which had been incurred previously to such delivery.

In January, 1868, Mr. Phelps mortgaged certain leaseholds and all the machinery, plant, carts, waggons, and everything upon the premises, to the plaintiff, but the deed was not registered under the Bills of Sale Act. In November, 1868, Mr. Phelps became a bankrupt, and the defendant Ede was appointed assignee. Mr. Phelps had effected the mortgage through his solicitor, the defendant Stretton, and had delivered to him the deeds relating to the property, for the purpose of preparing the mortgage deed. Mr. Stretton claimed a general lien upon the title deeds for costs incurred while acting as Mr. Phelps's solicitor, and previous to the deeds being delivered to him as above mentioned, but admitted the priority of the plaintiff.

Dickinson, Q. C., and Begg, for the plaintiff.

Greene, Q. C., and J. T. Prior, for the defendant Ede, contended that as the deeds had been delivered to the defendant Stretton for a specific purpose only, there could be no lien beyond that purpose. They cited *Young v. English*, 7 Beav. 10; *Colyer v. Clay*, 7 Beav. 188; 1 Fisher's Law of Mortgages, 168, 2nd ed.; *Balch v. Symes*, Turn. & Russ. 87; *Ex parte Sterling*, 16 Ves. 257; *Ex parte Pemberton*, 18 Ves. 282; *Re Broomhead*, 5 Dowl. & L. 52. They also contended that as the mortgage deed was not registered under the Bills of Sale Act, it was void as against the assignee in bankruptcy as to the

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personal chattels. They asked that the decree might therefore be limited to a decree for foreclosure of the leaseholds.

Wickens, for the defendant Stretton.

STUART, V. C., without calling for a reply, said that Lord Eldon, in *Ex parte Sterling* (*ubi sup.*), had laid down the rule that if the intention was to deposit papers for a particular purpose, and not to be subject to the general lien, that must be by special agreement; otherwise they were so subject. But there was no special agreement in the present case, and there was no doubt that it was a case in which the defendant Stretton had a right to a general lien until his costs were paid. With respect to the objection that some of the property did not pass by the mortgage deed, there was no evidence to justify the insertion in the decree of any particular direction respecting it. The ordinary form of decree was to give a right to foreclosure all the property comprised in the mortgage deed; but if a part of the property did not pass by the deed it would not be foreclosed. There would be the common decree of foreclosure, and an account of what was due to the plaintiff upon his security, and also of what was due to the defendant Stretton for costs; if nothing was due to Stretton, his lien would be at an end and he would have to pay his own costs, but if anything were due to him he would have a right to redeem, and if he did not redeem would be foreclosed.

SIMONS V. BAGNELL.

Practice—Motion to dismiss for want of prosecution after decree.

Where a decree was made in an administration suit, directing the usual accounts and inquiries, and the plaintiff took no steps to prosecute the decree.

Held, that the defendant was not entitled to move to dismiss for want of prosecution, but ought to apply to obtain the conduct of the cause.

The cases where a bill will be dismissed for want of prosecution after decree considered.

Barton v. Barton, 3 K. & J. 512, 6 W. R. Ch. Dig. 101, explained.

[19 W. R. 217.]

This was an administration suit, in which a decree had been made directing the usual accounts and inquiries.

T. Smith Osler, on behalf of White, one of the defendants, now moved to dismiss the bill for want of prosecution, and cited *Barton v. Barton*, 3 K. & J. 512, where it was held that after a decree merely directing accounts and inquiries, the bill might be dismissed.

Carlisle for the plaintiff, was not called on.

LORD ROMILLY, M. R., said that the motion was radically defective, and could not be granted. After decree made, the Court could not dismiss the bill unless something came out in the proceedings under the decree to show that no decree ought to have been made. The ground for dismissing the bill in *Barton v. Barton* was, that the defendants had allowed the decree to be taken without discussion, instead of raising the objection at the hearing. It was a radically bad case of misjoinder, and the Vice-Chancellor decided that the bill ought to be dismissed, notwithstanding a decree had been made at the hearing. Another case where a bill might be dismissed after decree was the ordinary case of a suit for

specific performance, where it was certified that a good title cannot be deduced; and in that case also the bill might be dismissed after decree. But where the plaintiff had obtained a decree, and took no steps to prosecute it, the proper course was, not to move to dismiss the bill for want of prosecution, but to apply to obtain the conduct of the cause.

Motion refused with costs.

GARDNER V. FREEMANTLE.

Club—Power of expulsion—Opinion of committee—Bona fide exercise of power—Jurisdiction.

When the committee of a club have power to expel any member whose conduct is in their opinion injurious to the interests of the club, and they exercise this power, all that is required is that the committee should form their opinion in a bona fide way, and the question whether their opinion is just or unjust is immaterial.

Two members of a club concerting together returned to a third member a number of circulars issued by him, sending them back in unpaid envelopes addressed in an annoying way; and one of the two members also sent one of the circulars unpaid to the committee of another club, to which the third member also belonged, and put the third member's initials outside the envelope. The third member complained to the committee of the club, charging one of the two members with the whole offence, and describing the last mentioned act as "forging his initials for an unworthy purpose." The committee having ascertained that the individual charged had only sent half the circulars to the complainant, and that the envelope bearing the complainant's initials was not sent by him nor with his express knowledge, expelled the complainant from the club.

The expelled member filed a bill and moved for an interlocutory injunction to restrain the committee from enforcing their sentence.

Held, that the Court had no jurisdiction to interfere.

[Dec. 15, 1870.—11 W. R. 226.]

The defendants to this bill were the committee of the Junior Carlton Club, who had expelled or affected to expel the plaintiff from the club; the bill was filed to have it declared that the sentence of expulsion was void, and the present motion was made to obtain an interlocutory injunction restraining the defendants from enforcing it.

The material rules of the Junior Carlton Club were as follows:—

1. The Junior Carlton shall be a political club in strict connection with the Conservative party, and designed to promote its object.

45. In case the conduct of any member, either in or out of the club-house, shall, in the opinion of the committee, be injurious to the character and interests of the club, the committee shall be empowered to recommend such member to resign; and if the member so recommended shall not do so within a month from the date of the letter of such recommendation, it shall be competent to the committee to proceed to expel such member, and to erase his name from the list, and such member shall for ever afterwards be ineligible to enter the club-house. Provided that no such recommendation shall be sent to any member, and no such expulsion shall actually take place, unless the same shall be agreed to by three-fourths of the members of the committee present at a meeting specially summoned for that purpose: Provided also, that if, on the meeting of the committee specially summoned, they should be unanimously of opinion that the offence of a member is sufficient for the interests of the club, to warrant his immediate expulsion,

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they shall be empowered at once to suspend from such member the use and advantages of the club before the expiration of the time within which it may be permitted him to resign in pursuance of such recommendation.

52 The committee shall, if possible, hold an ordinary meeting in every week, or oftener, if necessary, to transact current business, and to audit the accounts. Three of the committee shall form a *quorum* on the days of meeting.

[The facts are here fully set out.]

Sir R. Baggallay, Q. C., and Locock Webb, for the plaintiff—Your Lordship laid down, in *Hopkinson v. The Marquis of Exeter*, 16 W. R. 266, L. R. 5 Eq 68 that such a discretion as that here affected to have been exercised by the defendants must not be a capricious or arbitrary discretion. In the present case the defendants have exercised their discretion most arbitrarily. They make inquiries, and find that the plaintiff's charges are substantially true, and then tell the plaintiff that they will not go into the question. Then they turn round and call on the plaintiff to substantiate his charges, and call on him to resign before he has had time to do so. Moreover the plaintiff had quite sufficient ground for bringing his charges. They were, in fact, true. When two gentlemen made a conspiracy to play tricks on a third, each must be held responsible for the acts of the other. The facts show that the committee did not exercise an impartial discretion. The formalities required for expelling a member also were not fully performed; the notices are insufficient in not giving information that proceedings were to be taken under rule 45. They ought also to have been sent to all the members of the committee, as the members not summoned, though not sufficiently numerous to have turned the decision, might have persuaded the others to vote differently.

Jessel, Q. C., Wickens, and Kekewich, for the defendants, were not called upon.

Lord ROMILLY, M R—I should like very much to hear counsel for the defendants, but I think it would be a useless waste of time, as the view I at present take of the case is probably that which they would wish me to hold. I repeat over again that I assent to the expressions which Sir Richard Baggallay has cited. I point out that these clubs are formed entirely for social purposes, and there must be some paramount authority to keep up their objects. In some cases this Court will interfere with the exercise of that paramount authority, but only where there is a moral culpability, as if the decision is arrived at from fraud, personal hostility, or bias. But in cases of this description all that this court requires is to know that the persons who were summoned really exercised their judgment honestly. The Court will not consider whether they did so rightly or wrongly.

In the present instance the rule says that "in case the conduct of any member, either in or out of the club-house, shall, in the opinion of the committee be injurious to the character and interests of the club, the committee shall be empowered to recommend such member to resign." It is not, if the conduct is really injurious, but if it is injurious in the opinion of the committee: then all that the Court requires

is that the committee shall form their opinion in a *bona fide* way. There is no power in this Court to control the judgment or opinion of the committee.

[The learned Judge then discussed the merits of the case.]

There is no moral culpability in that from beginning to end. The committee think without going into the merits of the case, that it is best for one gentleman to withdraw from the club. It is impossible for me to form any opinion upon it, nor is it necessary for me to do so. But I am satisfied that the gentlemen who sat in judgment on this matter came to a sound judgment. And if you see that they have seriously examined the case, this Court cannot go a step further. I am satisfied that I should wrongly apply the functions of this Court if I were to sit in judgment on a set of gentlemen expressly selected for this purpose, who think it better that this gentleman should cease to be a member. Then, Mr. Locock Webb takes an objection which Sir Richard Baggallay did not take, that there were two members who never came and were not summoned. I can, therefore, dispense with that, and make no order upon this motion.

Sir R. Baggallay—Does your Lordship hold that the notices give sufficient intimation of the object of the special meetings of the committee?

Lord ROMILLY, M R—I am of opinion that the notices were sufficient. There is nothing said on the notice except "Mr. Gardner's case." But I think that was sufficient, for, as Mr. Douglas says, most of the members of the committee knew what it was about. The costs will be costs in the cause.

BANKRUPTCY.

Re TILL—Ex parte PARSONS.

Deed of assignment—Solicitor's lien—Court cannot impound.
The Court has no power to retain a deed which has been produced by a witness merely out of courtesy and to facilitate proceedings.

P., a witness, having a lien upon a deed, was asked by the Court to produce it. The deed was, upon its production, impounded by the Court.

Held, an appeal, that the Court had no power to retain the deed, even though it might be fraudulent.

[Dec. 19, 1870.—19 W. R. 325.]

This was an appeal against an order made in the County Court of Nottingham to the effect that a certain deed of assignment executed by the bankrupt should be impounded, under the following circumstances:—

On the 7th of September, 1870, shortly before the adjudication of bankruptcy, a deed of assignment to one Wild of some unfinished leasehold premises, executed by the bankrupt, was held by Parsons as Wild's solicitor.

Upon the 20th of September Parsons and Wild were each served with a summons to attend before the registrar of the county court for examination under the bankruptcy which had in the meantime taken place.

Wild, during his examination by Cranch, the trustee's solicitor, being asked to produce the deed, stated that it was in the possession of Parsons; an application was then made to Parsons for it, and he, after informing the Court

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that he had a lien upon it, nevertheless in all good faith sent for the deed, which was thereupon brought into court.

Cranch then suggested to the registrar that the deed should be impounded, and, notwithstanding a protest by Parsons, an order was made to that effect. Shortly afterwards Parsons made an application to the county court judge for the delivery up to him of the deed, but was refused.

Parsons appealed.

Reed, for the appellant, contended that it was a breach of faith on the part of the county court officials to detain the deed, and that if the trustee had any reason for supposing it to be invalid he should have taken proceedings to have it set aside in the legitimate way. He cited *Re Attwater*, 32 L. J. Bk'cy. 11; *Ex parte Southall*, 17 L. J. Bk'cy. 21; and *In re Moss*, 14 W. R. 814. L. R. 2 Eq. 345.

Winslow, for the respondent, said that the application to the county court judge was an appeal, and, not having been made within twenty-one days (the time limited for such matters), the present proceedings must fail for want of formality.

BACON, C.J.—The objection that it was an appeal from the registrar fails. The county court judge treated the application of Parsons as an original matter. Moreover any objection of that kind ought to have been made at the hearing in the court below. But it was not an appeal at all; Parsons was merely before the registrar as a witness, not as a party. The Court below had no right whatever to impound the deed, but if the registrar had thought fit a copy of it might have been made upon the spot. The fact that the deed may possibly have been fraudulent does not at all alter the matter; there is a regular course of proceeding provided for such cases. The order of the Court below must be discharged, and an order for the delivery of the deed to Parsons must be made. The trustee to pay the costs of the appeal, and of the application to the county court judge.

Order accordingly.

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(Continued from page 56.)

ACCOUNT.—*See* MORTGAGE; PARTNERSHIP.
ACTION.

An association, not incorporated, was formed of ship-owners for mutually insuring their vessels, and the premiums charged against the members made the fund for paying losses. The members, by a power of attorney, appointed the plaintiffs managers, with power to ask, demand, sue for, &c., all such sums of money as should become due and payable for premiums. The action was brought for premiums

due from a member. *Held*, that the plaintiffs were only agents of the persons to whom the money was due, and could not maintain the action.—*Gray v. Pearson*, L. R. 5 C. P. 568.

See CONFLICT OF LAWS, 2; PRINCIPAL AND AGENT, 2.

ADVANCEMENT.—*See* TRUST.

AGREEMENT.—*See* CONTRACT.

AMBIGUITY.

Devise "to my nephew, Joseph Grant." The testator's brother had a son named Joseph Grant, and the testator's wife's brother also had a son named Joseph Grant. *Held*, that there was a latent ambiguity, and that evidence was admissible to show which nephew was intended.—*Grant v. Grant*, L. R. 5 C. P. (Ex. Ch.) 727; s. c. 5 C. P. 380.

ANNUITY.

Testator gave property in trust, out of the annual profits to pay to P. B. during his life, the annual sum of £400, and the annual sum of £100 to W. B. during his life, and to S. C. during her life the annual sum of £600; the residue to P. B. and his heirs. The income was insufficient to pay the annuities in full, and was applied ratably. In 1868, W. B. died, and there was due to him a considerable arrear. *Held*, that the annuities were a continuing charge on the rents and profits until paid, and that the increase arising after the death of W. B. should be applied to paying ratably, first the arrears, and then the annuities.—*Booth v. Coulton*, L. R. 5 Ch. 684.

See FORFEITURE.

APPOINTMENT.—*See* POWER.

APPORTIONMENT.—*See* ANNUITY.

APPROPRIATION.—*See* CHARGE.

ARBITRATION.

An arbitrator made an award; an accidental omission in respect of costs being discovered, he made a new award identical with the first, except that the omission was supplied. *Held*, that when he had signed his award, the arbitrator was *functus officio*, and could not correct any mistake; also, that an arbitrator, having power by an order of a Court of Equity to award costs, could award costs as between solicitor and client.—*Mordue v. Palmer*, L. R. 6 Ch. 22.

ASSIGNMENT.

1. The defendant agreed to sell to P. certain leasehold premises, and received part of the purchase-money, the conveyance to be executed in twelve months upon payment of the residue. Afterwards P. agreed to assign to the plaintiff this contract as security for an advance, and the plaintiff gave notice thereof

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to the defendant. After the time for completion of the contract, P. paid the residue of the purchase-money to the defendant, and received from him a conveyance of the property, without notice to the plaintiff. Upon a bill to make the defendant liable for the loss occasioned thereby, *held*, that the plaintiff having taken no steps to complete the contract, had no claim on the defendant.—*M'Creight v. Foster*, L. R. 5 Ch. 604.

2. A debtor assigned his property for the benefit of his creditors in consideration of their covenanting not to take proceedings against him for three years; the indenture provided that such creditors as should not sign it within six months should be excluded from its benefits. One of the creditors neglected to sign, but acquiesced in it, and abstained from proceedings against the debtor. *Held*, that he was entitled in equity to participate in the benefits of the deed.—*In re Baber's Trsts*, L. R. 10 Eq. 554.

See ESTOPPEL, 1; LANDLORD AND TENANT, 8; PATENT, 1.

ASSAULT.—*See* CRIMINAL LAW, 1; MASTER AND SERVANT, 1.

ATTORNEY.—*See* LANDLORD AND TENANT, 1.

AWARD.—*See* ARBITRATION.

BANKRUPTCY.

By sec. 18 of the Bankruptcy Act, 1859, the court has power at any time after presentation of a bankruptcy petition to restrain further proceedings in any action, suit, or other legal process against the debtor in respect of any debt proveable in bankruptcy. *Held*, that this gave no power to restrain an action against the debtor jointly with another.—*Ex parte Isaac*, L. R. 6 Ch. 58.

See CONFLICT OF LAWS, 1; FRAUDULENT CONVEYANCE.

BILL OF LADING.—*See* EVIDENCE.

BILLS AND NOTES.

1. A promissory note for £500 payable in eight months was given to a company by B. and a surety. There was a current account between B. and the company, which was continued for three years after the date of the note. The items to the credit of B. were more than sufficient to satisfy all that was due to the company at the date of the note, but on the whole account a balance was due to the company. *Held*, that the presumption was that the note was given for money then due, and that the burden was on the payee to prove that it was intended to be a running security for the balance from time to time.—*In re Boys*, L. R. 10 Eq. 467.

2. The defendant accepted the plaintiff's bill, and the plaintiff gave him a written promise that, if any circumstances should prevent him from meeting the bill, the plaintiff would renew it. The defendant was prevented from meeting it, and within a reasonable time after it became due applied to the plaintiff to renew it; he refused. *Held* (CLEASBY, B., dissenting), that this was a good defence to an action on the bill.—*Millard v. Page*, L. R. 5 Ex. 312
See CHARGE, 1; SECURITY.

BREACH OF PROMISE.—*See* CONTRACT, 4.

BROKER.—*See* PRINCIPAL AND AGENT, 1.

BURDEN OF PROOF.—*See* BILLS AND NOTES, 1; MASTER AND SERVANT, 1.

CARRIER.

H. represented to the plaintiff that he had obtained an order for goods from C. T. & Co., of 71 George Street, Glasgow; and the plaintiff on the next day sent the goods by a carrier to that address. There was no such firm, but H. had made arrangements to receive at that place letters, &c., directed to it. The carrier following the regular course of business, sent a notice to that address of the arrival of the goods. H. received the notice, indorsed it in the name of C. T. & Co., and so obtained the delivery of the goods, which he applied to his own purposes. *Held*, that the carrier had delivered the goods to the person who represented himself to the plaintiff as C. T. & Co., and, being guilty of no negligence, was not liable for their loss. *M'Kean v. M'Ivor*, L. R. 6 Ex. 86.

CHARGE.

1. The New Orleans Bank drew a bill for £2000 on the Bank of Liverpool in favor of the plaintiffs, who bought it on the faith of representation by the cashier of the N. O. Bank that funds sufficient to meet it were then lying in the Bank of Liverpool, specifically appropriated to that purpose. Before acceptance, the N. O. Bank suspended payment. *Held*, that no charge was created upon the funds of the New Orleans Bank in the Bank of Liverpool.—*Thompson v. Simpson*, L. R. 5 Ch. 659; s. c. L. R. 9 Eq. 497.

2. Testator devised all his real estate upon trust to pay to his housekeeper 12s. per week, and the remainder of the rents and profits upon other trusts. He had no freehold estate, but he had leaseholds which he believed to be freehold. *Held*, that the leaseholds were charged with the payment of 12s. per week.—*Gully v. Davis*, L. R. 10 Eq. 562.

See ANNUITY; EXONERATION; LIFE, 1.

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CHARTER PARTY.

1. A charter party contained a stipulation that the ship should proceed with a cargo to San F., "where the ship shall be consigned to the charterer's agents inwards and outwards, paying the usual commissions . . . and deliver the same . . . and so end the voyage," and also that the ship should be reported by the charterer's agents at the custom-house on her return to the United Kingdom. *Held*, that the contract required the owners to employ the agents in case they took in a return cargo, but imposed no obligation on them to take such cargo.—*Cross v. Pagliano* L. R. 6 Ex. 9.

2. A charter party gave the freighters the option of sending the vessel on an intermediate voyage, with a cargo at a specified rate; "such freight to be paid as follows: £1200 to advanced the master," and to be deducted with commission and cost of insurance from freight on settlement thereof, and the remainder on delivery of the cargo at port of discharge; the master to sign bills of lading at any current rate of freight required, "but not under chartered rates except the difference is paid in cash." The freighters sent the vessel on an intermediate voyage, and required the master to sign bills of lading at a rate below the rate in the charter party, without paying in advance the difference on the £1200. The vessel was lost on her way to sea. *Held*, that the ship-owner was entitled to the difference and to the £1200.—*Byrne v. Schiller*, L. R. 6 Ex. 20.

3. By a charter party the plaintiff's ship was to proceed to Archangel, "and there load . . . a full and complete cargo of oats, or other lawful merchandise," and to deliver the same at destination on being paid at a fixed rate "for oats, and if any other cargo be shipped, to pay in full and fair proportion thereto according to the London Baltic printed rates," which fix the proportions between the rates for different articles. The defendant shipped a full cargo of flax, tow, and codilla, articles which were so light that the ship had to carry a great quantity of ballast; and he paid freight at a rate proportioned according to the tables to the rate fixed for oats. The plaintiff claimed to recover the difference between this sum and that which would have been payable for a cargo of oats. *Held*, that the defendant had a right to ship the cargo which he did ship, and had fulfilled his contract.—*Southampton Steam Colliery Co. v. Clarke*, L. R. 6 Ex. (Ex.

Ch) 58; s. c. L. R. 4 Ex. 73; 3 Am. Law Rev. 697.

CLASS.—See WILL, 6

COLONY.—See CONFLICT OF LAWS, 2.

COMPENSATION.—See DAMAGES, 2; RAILWAY.

COMPANY.

1. The memorandum of association of a company was subscribed by H., a director, for 500 shares; only 250 were allotted to him. The articles provided that the directors might at any time accept from any member the surrender and forfeiture of any shares; the company and directors were prohibited from dealing in shares. Afterwards with the approval of the company, H. was released, under the seal of the company, from all liability in respect of the 250 shares not allotted to him. *Held*, that the transaction was not a surrender or forfeiture, but a dealing in shares and *ultra vires*.—*Hull's Case*, L. R. 5 Ch. 707.

2. By the articles of a loan company, power was given to the directors to make loans, and to delegate any of their powers to committees. A committee appointed to attend to loans employed money of the company to purchase shares, and to conceal the transaction, represented the payments on the books as loans to members of the committee; the transaction was reported to the directors and sanctioned by them. M. was a director, and denied that he had any notice of the real nature of the of the proceeding. A bill was brought against the directors to recover the money so used, and a decree made against them. *Held*, that the bill as against M. should be dismissed.—*Land Credit Company of Ireland v. Lord Fermoy*, L. R. 5 Ch. 763; s. c. L. R. 8 Eq. 7.

See ACTION; CONTRACT, 8; EQUITY, 8; EXECUTOR, 2; JURISDICTION; NOVATION; LIEN, 2; ULTRA VIRES.

COMPOSITION.—See PRINCIPAL AND AGENT, 3.

CONCEALMENT.—See CONFIDENTIAL RELATION; INSURANCE, 2.

CONFIDENTIAL RELATION.

An estate was settled in strict settlement with power to the trustees at the request of the tenant for life to sell or exchange. The trustees at his request were about to exchange part of the estate, but difficulties in conveyancing arose, and therefore the tenant for life bought it of the trustees and made the exchange himself. *Held*, that the tenant for life was not in a fiduciary relation as to the power, and he having given a fair price, the sale could not be impeached. *Quære*, whether he was in the same position as a stranger as to the

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obligation to communicate what he knew.—*Dicconson v. Talbot*, L. R. 6 Ch. 32.

CONFLICT OF LAWS.

1. By the Dutch Indian law, all the property of husband and wife are brought into community at marriage; this community may be excluded by contract executed before marriage; but no such contracts affect third parties till registered. M. and his wife were married at Batavia and made a contract before marriage by which 75,000 guilders were settled upon the wife for her separate use; this contract was not registered. They came to England where M. became bankrupt and the wife claimed to prove against his estate for 75,000 guilders. *Held*, that the law with respect to registration did not affect the contract, but only the remedy; and that the wife could prove, being entitled to do so by the *lex fori*.—*Ex parte Melbourne*, L. R. 6 Ch. 64.

2. The Governor, Legislative Council, and Assembly of Jamaica, passed an Act indemnifying the defendant and other officers for all acts done in suppression of a rebellion there. The defendant was the governor, and was a necessary party to the passing of the Act. An action was brought in England for trespasses within the Act. *Held*, that it was competent for the Legislature to ratify the Acts which had been done, and that the effect was to take away the plaintiff's right of action in England; also, that it was no objection to its validity that the defendant was a party to the Act as governor.—*Phillips v. Eyre*, L. R. 6 Q. B. (Ex. Ch.) 1; s. c. L. R. 4 Q. B. 225; 4 Am. Law Rev. 97.

See DIVORCE.

CONSPIRACY.—See CRIMINAL LAW, 2

CONSTRUCTION.—See CHARGE, 2; CHARTER PARTY, 1; CONTRACT, 1, 2; EXONERATION; FORFEITURE; FRAUDS, STATUTE OF; GUARANTY; INSURANCE, 2, 4, 5; LIMITATIONS, STATUTE OF; PARTNERSHIP; SETTLEMENT, 2, 3; STATUTE; ULTRA VIRES; WILL.

CONTINGENT REMAINDER.—See WILL, 7.
CONTRACT.

1. L. leased certain lands with the mines thereunder; the lease contained this clause: "Yielding and paying unto the said L., his heirs, &c., for every quantity of 2520 lbs. of coal, &c., the produce of any lands or mines not intended to be included in the present demise, but which shall be raised within the distance of twenty miles, and shall be brought, over, or under the said lands, &c., the royalty or sum of one half-penny." The lessee undertook the premises to a railway company, which

erected sidings upon them, and used them for the purpose of shunting trains till they could be sent forward on the main line; some of the trains contained coal, &c., from other lands within twenty miles. *Held*, that the coals were brought "over" the land within the meaning of the proviso.—*Great Western Railway Co. v. Rouse*, L. R. 4 H. L. 650.

2. Lease by the plaintiff to the defendant of pits of clay under the plaintiff's lands, with liberty to enter upon such lands and dig for and carry away all such pipe, potter's and and other merchantable clays in such lands, for the term of twelve years, paying in respect of all clays obtained from the lands certain royalties; the defendant among other things covenanted to dig and remove from the lands, "in pursuance of the grant or demise hereby made, an aggregate amount of not less than 1000 tons, nor a larger quantity than 2000 tons, of pipe or potter's clay" yearly. Breach, that the defendant had not dug an aggregate amount of not less than 1000 tons. Plea, that there were not 1000 tons under the lands. *Held*, that the covenant only fixed the rate at which the clay under the land should be worked and that as there was no clay, there was no breach.—*Clifford v. Watts*, L. R. 5 C. P. 577.

3. M. was employed by an insurance company as their agent for five years, at a salary of £500 yearly, and a commission of 10 per cent. on the profits of each year. Before the end of the five years the company was wound up. *Held*, that he was entitled to the estimated value of his salary till the end of the five years, but had no claim for commission since the winding up.—*Ex parte Maclure*, L. R. 5 Ch. 787.

4. The defendant promised to marry the plaintiff upon the death of the defendant's father. An action was brought while the father was still alive, but the defendant had positively refused ever to marry the plaintiff. *Held* (MARTIN, B., dissenting), that there was no breach of the contract.—*Frost v. Knight*, L. R. 5 Ex. 822.

See ASSIGNMENT, 1; BILLS AND NOTES, 2; CARRIAGE; CHARTER PARTY; CONFLICT OF LAWS, 1; DAMAGES, 3, 4; ESTOPPEL, 1; FRAUDS, STATUTE OF; GUARANTY; PRINCIPAL AND AGENT, 4; SPECIFIC PERFORMANCE; ULTRA VIRES, 1; VENDOR AND PURCHASER, 1, 2.

CONTRIBUTION.

A bond was given by a principal and two sureties; by its terms neither of them was to be discharged by any arrangement between the principal and obligee either for extension

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of time or further security; one of the sureties failed and compounded with his creditors. The debt secured having become payable, the obligee required the principal to furnish another surety, and at his request the plaintiff gave a separate undertaking to the obligee to pay the debt in instalments; having paid it he filed a bill against the other surety for contribution. *Held*, that a co-suretyship was intended, and that the other surety must contribute.—*Whiting v. Burke*, L. R. 10 Eq. 539.

CONVERSION.—*See* CARRIER; ESTOPPEL, 2.

CORPORATION.—*See* SPECIFIC PERFORMANCE, 2.

COSTS.—*See* ARBITRATION; EQUITY PLEADING AND PRACTICE.

COVENANT.—*See* CONTRACT, 2; LANDLORD AND TENANT, 2.

CRIMINAL LAW.

1. An information charged that the defendant "in and upon L. (a member of the Legislative Assembly of a colony) did make an assault, and him, L., did then beat, wound, and ill-treat, in contempt of the Assembly, in violation of its dignity, and to the great obstruction of its business." Upon demurrer, *held*, that a common assault was charged with apt words, and that this effect was not taken away by the other words.—*Attorney-General of New South Wales v. Macpherson*, L. R. 8 P. C. 268.

2. A member of a firm, in order to cheat his partner, agreed with J. and P. to make it appear by false entries in the partnership books that P. was a creditor of the firm, and by these means to withdraw money from the firm, to be divided between them to the exclusion of the other partner. *Held*, that the agreement constituted a conspiracy, being a fraudulent combination to do acts which were wrongful, although not criminal.—*Regina v. Warburton*, L. R. C. C. 274.

DAMAGES.

1. The Court of Chancery will interfere to prevent a tenant for life from cutting down trees planted for ornament; but when the trees are cut down, the reversioner has no claim for damages unless some damage has been done to the inheritance.—*Ex parte Hastings*, L. R. 10 Eq. 465.

2. Land subject to restrictions and formerly used as a grave-yard was taken for a street by authority of an Act of Parliament. *Held*, that the measure of the compensation to be given to the owner was the value of the land in its former character, not what would be its value to the person acquiring it.—*Stebbing v. Metropolitan Board of Works*, L. R. 6 Q B. 87.

3. The plaintiff was a lessee, and assigned his lease to the defendant upon his agreement to indemnify the plaintiff against breach of the covenants therein. The lessor brought an action for a breach against the plaintiff, who proposed to the defendant to come in and defend; the defendant declined, and the plaintiff paid the money into court, and brought this action. *Held*, that the plaintiff was entitled to recover, in addition to the damages paid, all the costs incurred, including every thing that his attorney could recover against him.—*Howard v. Lovegrove*, L. R. 6 Ex. 48.

4. A. possessed a lease which could not be assigned without the lessor's consent; he contracted to sell it to the defendants, but the consent was never obtained. The defendants in good faith agreed to sell their interest to the plaintiffs, who paid a deposit. Having failed to obtain the lessor's consent to the assignment, the defendants failed to make a good title. *Held*, that the defendants, having acted in good faith, the plaintiffs could recover only the deposit and expenses, and not damages for loss of the bargain.—*Bain v. Fothergill*, L. R. 6 Ex. 59.

See RAILWAY.

DEBTOR AND CREDITOR.—*See* ASSIGNMENT, 2; EXECUTOR, 2; FRAUDULENT CONVEYANCE; PRINCIPAL AND AGENT, 8.

DELIVERY.—*See* ESTOPPEL; 2.

DEVIATION.—*See* INSURANCE, 2.

DIRECTORS.—*See* COMPANY; ULTRA VIRES, 2.

DIVORCE.

A woman who was married and domiciled in England, was deserted by her husband; she went to America and resided in Iowa two years and a half; at the end of that time she petitioned the proper court of that State for a divorce by reason of her husband's adultery and desertion, causes which would have entitled her to a divorce in England; in the absence of her husband a notice of the proceedings was advertised by order of the Court and the facts being proved, the divorce was granted. *Held*, that there was no evidence that the woman ever obtained a domicile in Iowa; and that the divorce obtained there did not invalidate the English marriage.—*Shaw v. Attorney-General*, L. R. 2 P. & D. 166.

DOMICIL.—*See* DIVORCE.

ELECTION.

Real estate was devised in trust for testator's wife for life, and after her decease to sell for the benefit of his children as she should appoint; she appointed to his three sons equally. Afterwards by will she purported

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to devise this estate to the eldest son alone, and gave the residue of her own property to the three equally. One of the younger sons dying intestate, she gave by a codicil his share of her property to his children. *Held*, that the children of the deceased son must elect between their interest under the will and the intestate's share under the appointment; and that this share was to be considered as free from his debts if his estate had been settled; otherwise, as subject to a proportion of them. *Cooper v. Cooper*, L. R. 6 Ch. 15.

EQUITY.

1. A. the secretary of a company, was prosecuted by E., a shareholder, for making a false balance-sheet; the complaint being dismissed, the directors of the company ordered that an action be brought at the company's expense, in A.'s name against E. for malicious prosecution; in this action A. recovered £50 and costs. Upon a bill by E. against A. and the directors for an injunction against issuing execution, and for an order to pay A.'s expenses in that action, *held*, that whether the conduct of the directors amounted to maintenance or not, was a question for a court of law, and that there was no ground for equitable interference.—*Elborough v. Ayres*, L. R. 10 Eq. 367.

2. A bill for an injunction against the infringement of a patent, and for compensation in damages, was filed four days before the expiration of the patent. *Held*, that as it was impossible to give any equitable relief before the patent expired, the bill must be dismissed.—*Betts v. Gallais*, L. R. 10 Eq. 392.

3. A creditor cannot maintain a bill for an injunction against a company, on the ground that he is about to lose his debt by reason of their making way with the assets.—*Mills v. Northern Railway of Buenos Ayres Co.*, L. R. 5 Ch. 621.

4. The court of Chancery has power, if a proper case should be proved, to restrain any person from making an improper application to Parliament, but it is difficult to conceive or define the cases in which it would be proper for the Court to exercise that power.—*Ex parte Hartridge and Allender*, L. R. 5 Ch. 671.

See ASSIGNMENT; DAMAGES, 1; PATENT, 1; RECEIVER; SECURITY; SETTLEMENT, 1.

EQUITY PLEADING AND PRACTICE.

Where a bill has been filed without any dispute having been raised by the defendant, and the defendant offers to submit to the plaintiff's demand, the Court will stop the suit without costs.—*Rudd v. Rowe*, L. R. 10 Eq. 610.

ESTOPPEL.

1. The defendants were a body corporate, and were authorized to borrow money upon the security of mortgages which should be transferable; they illegally granted to H. six mortgages in the form prescribed, which were assigned to the plaintiffs for value and without notice. *Held*, that the defendants were estopped from disputing the validity of the securities.—*Webb v. Herve Bay Commissioners*, L. R. 5 Q. B. 642.

2. Action for conversion. The defendant had a quantity of barley in his granary which was near a railway station; he sold 80 quarters to M., but it was not paid for, and no appropriation was made. While it remained in the granary subject to M.'s orders, M. sold 80 quarters to the plaintiff, receiving payment for it, and gave him a delivery order; the plaintiff sent the order to be confirmed to the station-master, who showed it to the defendant; the defendant said, 'All right; when you get the forwarding note I will put the barley on the line.' M. having become bankrupt, the defendant as unpaid vendor refused to part with the barley when the plaintiff sent the forwarding order. *Held*, that the defendant, having altered the plaintiff's position by what he had said, was estopped from denying the plaintiff's property in the barley.—*Knights v. Wiffen*, L. R. 5 Q. B. 560.

See LIEU, 2.

EVIDENCE.

By a collision between the J. B. and the E. for which the J. B. was solely to blame, the E. and her cargo were lost. A cause of damage was instituted against the J. B. by S. and others, who described themselves as "owners of cargo, now or lately laden on board the vessel E." It appeared that they were underwriters on the cargo, and had paid the shippers for a total loss, and that the policies and bills of lading containing the names of the shippers had been given up to them. *Held*, that the evidence was insufficient to show that the insured was the owner of the goods, or that the title passed to the underwriters.—*The John Bellamy*, L. R. 8 A. & E. 129.

See AMBIGUITY; DIVORCE; PRIVILEGE; REVOCATION.

EXECUTOR.

1. An executrix assigned all the testator's debts, being a large part of his estate, to a creditor as security for his debt, with power to collect them as her attorney, until the payment of his debt. The estate proved insolvent, and another creditor filed a bill to have the

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assignment declared void. *Held*, that the executrix had a right to mortgage assets to a creditor, in the absence of fraud.—*Earl Vane Riden*, L. R. 5 Ch. 668.

2 The executors of a deceased shareholder in a company paid a legacy under the will. The company subsequently was wound up and the executors placed on the list of contributors, but the estate was insufficient to pay the calls. *Held*, that the executors had committed a breach of trust in paying the legacy without providing for the liability of the testator's estate in respect of these shares, and were liable for the amount.—*Taylor v. Taylor*, L. R. 10 Eq. 477.

EXECUTORY DEVISE.—*See WILL*, 7.

EXECUTORY TRUST.—*See WILL*, 2.

EXONERATION

1. A testatrix gave one moiety of her real estate to M for life, remainder to M's two sons and their issue; and the other moiety to S. for life, remainder to S's sons, and &c. By a codicil reciting that she had incurred debts as surety for one of M's sons, she directed that those debts should be "exclusively and in the first instance borne by and paid out of" the moiety of her real estate devised to M. and her sons, and that the other moiety devised to S and her son should be exempt from the payment of said debts. *Held*, that the direction exonerated the personal estate as well as all other parts of the real estate.—*Forrest v. Prescott*, L. R. 10 Eq. 545.

EXTINGUISHMENT.

In 1825, A. mortgaged real estate to secure £27,000 for one year, with power of sale in case of default. Default was made; and by an indenture between A. and the mortgagee, and K in 1830, reciting that "the said power (of sale) had not been and is not intended to be exercised," the mortgaged debt was assigned to K, and all remedies for recovering the same and all benefit of the mortgage, and the estate was mortgaged to secure the debt to K. for seven years, without any right in K. to foreclose or compel payment during the term, and with a power of sale in case of default. *Held*, that the power of sale in the mortgage of 1825. was extinguished by the indenture of 1830.—*Boyd v. Petrie*, L. R. 10 Eq. 482.

See POWER, 1.

FORFEITURE.

A wife, having a power of appointment (subject to a life-estate in her mother). by will appointed the property upon trust to pay an annuity of £100 to her husband during his life, with a declaration that if he should be-

come bankrupt, or should assign, charge, or incur, then the annuity should cease to be payable, as if he were dead; with a further direction that the trustees might, in their discretion, and without assigning any reason, at any time discontinue payment of the annuity during the whole or any part of his life. Before the date of the will, the husband was with the knowledge of his wife, adjudged a bankrupt in a sequestration according to Scotch law, the effect of which was to divest him of any estate which came to him before he obtained a discharge; he obtained his discharge after the death of the tenant for life. *Held*, that the Scotch bankruptcy was not a bankruptcy within the meaning of the forfeiture clause; but that the annuity was subject to the absolute discretion of the trustees.—*Trappes v. Meredith* (No. 2), L. R. 10 Eq. 604.

FRAUD.—*See COMPANY*, 2.

FRAUDS, STATUTE OF.

The defendant, being chairman of a local board, asked the plaintiff whether he would lay certain pipes; the plaintiff said, "I have no objection to do the work if you or the local board will give me the order." The defendant said, "You go on and do the work and I will see you paid." The work was not authorized by the board, and they refused to pay for it. *Held*, that the defendant's contract was that he would be answerable for the expected liability of the board, and that this was a promise, within the Statute of Frauds, to be answerable for the debt of the board although the board was never indebted.—*Mountstephen v. Lakeman*, L. R. 5 Q. B. 618.

FRAUDULENT CONVEYANCES

A creditor, learning that his debtor's business was improperly conducted, pressed him for payment; the debtor not being able to get the money, verbally agreed to convey to him certain real estate in part payment, and instructions therefor were given to a solicitor; owing to the solicitor's illness the conveyance was not made for two months, and six weeks after the conveyance the debtor filed a petition in bankruptcy. *Held*, that the conveyance, being made in consequence of a demand by the creditor, was not fraudulent; *also*, that the rule was not altered by the Bankruptcy Act.—*Ex parte Tempest*, L. R. 6 Ch. 70.

FREIGHT.—*See CHARTER PARTY*, 2, 3.

GIFT.

S. gave the following memorandum signed by him to M.: "I hereby give and make over to M. an India bond, value £1000," &c.; the bond was not delivered, and there was no con-

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sideration. S. died, and the residuary legatees claimed the bond. *Held*, that the memorandum was a good declaration of trust, and that M. was entitled to the bond.—*Morgan v. Malleson*, L. R. 10 Eq. 476.

See TRUST; WILL, 4.

GUARANTY

S. was admitted as a subscriber to Lloyds', and the defendant gave a guarantee for any debts that he might contract as an insurance-broker until notice of the discontinuance of the guarantee. S. afterwards took H. into partnership with him, and the defendant wrote a letter discontinuing the guarantee, but was induced to write another letter, in which he withdrew the notice and declared that the guarantee should "continue in force upon the same terms and conditions as are mentioned in such guarantees." By the rule of Lloyds, each subscriber is allowed to have one or more substitutes, and S. obtained a ticket for the admission of H. as his substitute; the partners continued to transact business at Lloyds for several years after the last letter was written, and always in the partnership name. *Held*, that the guarantee applied to the debts incurred in such transaction.—*Leathley v. Spyer*, L. R. 5 C. P. 515.

HUSBAND AND WIFE.—See SETTLEMENT, 3.

INDEMNITY.—See DAMAGES, 8.

INDEMNITY. STATUTE OF.—See CONFLICT OF LAWS, 2.

INDICTMENT.—See CRIMINAL LAW, 1.

INJUNCTION.—See BANKRUPTCY; DAMAGES, 1; EQUITY, 1, 3, 4; PATENT, 1.

INSURANCE.

1. Policy of insurance on a steam-vessel from Montreal to Halifax; the following perils were excepted: "rottenness, inherent defects, and other unseaworthiness; bursting or explosion of boilers, or collapsing of flues, or breakage of machinery." There was a defect in the boiler, which made it unmanageable as soon as the vessel was in salt water; she had to put back to have it remedied, and eventually resumed the voyage, met with bad weather and was lost. *Held*, that the implied warranty of seaworthiness was not excluded by the terms of the policy, and that it was not complied with, the vessel not being seaworthy at the commencement of the portion of her voyage which was to be made in salt water.—*Quebec Marine Insurance Co. v. Commercial Bank of Canada*, L. R. 3 P. C. 234.

2. Insurance on a ship at and from Buenos Ayres, and port or ports of loading in the Province of Buenos Ayres, to port of call and

discharge in the United Kingdom. The plaintiffs knew, when they effected the insurance, that the ship was going to L. to load, but did not communicate the fact to the underwriters, to whom L. was unknown as a place of loading, and who would have required a higher premium if they had known it. L. is an open bay, and vessels have to load by means of lighters; there is a regular trade between L. and Buenos Ayres, but not between L. and Europe. The ship loaded at L., and was lost returning to Buenos Ayres. *Held*, that the plaintiffs had concealed a material fact, which vitiated the policy; *held, also*, by the majority of the court, that L. was a port of loading within the meaning of the policy.—*Harrover v. Hutchinson*, L. R. 5 Q. B. (Ex. Ch.) 584; s. c. L. R. Q. B. 528; 4 Am. Law Rev. 292.

3. Insurance upon goods, on a voyage from Liverpool to Matamoras, against perils of the seas, men-of-war, takings at sea, arrests, and restraints of kings, princes, and people. The vessel was seized by a United States cruiser by reason of carrying contraband of war, and carried in for condemnation; the Prize Court decreed restitution, and the captors appealed; the goods, having become deteriorated, were sold under an order of Court; the insured thereupon abandoned to the underwriters, who refused to accept it. The owner might have obtained possession of the goods at any time by giving bail, but he never did so; gold was then at a premium of 150 to 180 per cent. *Held*, that the sale of the goods by order of the Court entitled the insured to recover for a total loss.—*Stringer v. English and Scotch Marine Ins. Co.*, L. R. 5 Q. B. (Ex. Ch.) 599; s. c. L. R. 4 Q. B. 676; 4 Am. Law Rev. 472.

4. Insurance upon goods against fire "from the 14th February, 1868, until the 14th August, 1868, and for so long after as the said assured shall pay the sum of \$225." A condition provided that the policy should not be in force until the premiums were actually paid and persons continuing annual insurance, must pay the premium before the commencement of the succeeding year. The first premium was paid, and on the 14th August, 1868, before any further payment was made, the goods were destroyed by fire. *Held*, that the insurance covered the 14th August.—*Isaacs v. Royal Insurance Co.*, L. R. 5 Ex. 296.

5. Insurance against death by accident, "where such accidental injury is the direct and sole cause of death to the insured," but not "against death or disability arising from . . . erysipelas, or any other disease or acci-

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dary cause or causes arising within the system of the insured before or at the time of or following such accidental injury (whether causing such death or disability directly or jointly with such accidental injury)." On a Saturday, as the insured was washing his feet in an earthen-ware pan, it broke, and a wound was inflicted on the foot; the wound was properly attended to, but on Thursday following erysipelas set in, and on Saturday died. The erysipelas was consequent on the wound, and without the wound he would not have had it. *Held* (KELLY, C. B., dissenting), that the insurers were exempted from liability by the exception in the policy.—*Smith v. Accident Insurance Co.*, L. R. 5 Ex. 302.

See ACTION; EVIDENCE.

INTENTION.—See TRUST.
INTEREST.

The owner of iron-works employed the plaintiff as manager, and agreed to give him seven and a half per cent. of the profits. An account being taken, it appeared that in two of the years there was due to the plaintiff a larger amount than he had received. *Held*, that the plaintiff was not entitled to interest on the excess from the end of each year, but only from the time of demand.—*Rishton v. Grissell*, L. R. 10 Eq. 893.

JURISDICTION.

The Companies Act, 1862, provides that "any partnership, association, or company, except railway companies, incorporated by Act of Parliament, . . . may be wound up under this Act," &c. *Held*, that the Court had jurisdiction to wind up a canal company incorporated by Act of Parliament, although it could not carry it into complete effect without the aid of Parliament.—*In re Bradford Navigation Co.*, L. R. 10 Eq. 381.

See BANKRUPTCY; EQUITY, 1,2,4; RECEIVER.
(To be continued.)

REVIEWS.

THE COMMON LAW PROCEDURE ACT AND OTHER ACTS RELATING TO THE PRACTICE OF THE SUPERIOR COURTS OF COMMON LAW AND THE RULES OF COURT, WITH NOTES. By Robert A. Harrison, Esq., D. C. L., Q. C.—Second Edition—Toronto: Copp, Clark & Co. London: Stevens & Haynes, 1870.

We have noticed the receipt of the various numbers of this work, as they from time to time appeared, and we hailed with pleasure the last one, which, giving us the index and

table of cases, &c., enabled us to have the book bound and put in a shape for daily reference.

When the first edition of Mr. Harrison's work was given to the public, it was received as a boon by the profession here, welcomed with words of commendation by our Judges, and called forth the most flattering notices from the legal press in England, where sharp criticism is the rule, and where, though Colonial productions may have a courteous reception, they do not escape the probe of the critic. However, it stood the test, and this was the more creditable to the Editor when it is remembered, that his work was prepared principally before he devoted himself to the general practice of a lawyer's office. Knowing this and knowing the extent of his experience and industry, and the position he has won for himself since the first edition was published, we looked with confidence for even a greater measure of success for the second, and in this we are not disappointed.

On examining the notes we find that they are more condensed than in the first edition, arising partly from the fact that doubtful points which were then discussed at length, are now settled by judicial interpretation; and this process of expunging matter of discussion and substituting the authoritative decisions of the Courts, will account for the fact that while in the present edition there is *nearly double* the matter to be found in the first edition, the book itself is no larger, and equally if not more convenient for use—and here we may remark that considerable space has been gained and the look of the volume much improved, by making the notes the whole width of the page.

As it now stands, the work is eminently useful for reference as an annotated edition of the acts contained in it, and as compared with other similar works on the same subject, the volume before us is by far the most complete. But is not merely an annotated edition of an act; it is, in addition, a collection of treatises on different subjects, exhausting the cases decided in the English, Irish and Canadian Courts. To explain this, the reader will find that on page 105 *et seq.*, the practice as to change of venue is fully discussed. Upon reference to note r, page 169, there will be found full notes on equitable pleadings, occupying no less than eight pages of closely

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printed matter; and again on turning to the Rules, we find on page 680 *et seq.*, a short but comprehensive and compact *resumé* of the law respecting security for costs—and these are only a few out of many instances that could be referred to under this head.

As to the merits of the work itself it is scarcely necessary for us to add our meed of praise to that accorded to the first edition by all parties who have had occasion either to criticise or to use it, but we can say that the present edition is in every respect superior to the first, as well as to the number of acts annotated, as to the number of decisions collected and analysed and the mode of arranging them, the compactness of the information given and the correctness of the citations and authorities, the number of which is immense, there being no less than over 8,500 cases referred to throughout the work. Of one thing the editor may well feel no little gratification, namely, that when in the prior edition he hazarded an opinion as to what the decision would be likely to be on any doubtful point, or suggested an interpretation of any clause in the act, the views expressed have in every instance within our knowledge been borne out by judicial authority.

The contents are: The Common Law Procedure Act (Con. Stat. U. C. cap. 22); Writs of Mandamus and Injunction (Con. Stat. U. C. cap. 23); Absconding Debtors (Con. Stat. U. C. cap. 25); Ejectment (Con. Stat. U. C. cap. 27); The Common Law Procedure Amendment Acts (Stat. Can. 29, 30 Vic. cap. 42, and Stat. Ont. 31 Vic. cap. 24); Executions against Goods and Lands (Stat. Ont. 31 Vic. cap. 25). The Law Reform Act (Stat. Ont. 32 Vic. cap. 6); The Law Reform Amendment Acts (Stat. Ont. 33 Vic. cap. 7, and Stat. Ont. 33 Vic. cap. 8); *Regulæ Generales* (as to Attorneys, Practice, Pleadings, and Miscellaneous). We should have been glad if the act respecting arrest and imprisonment for debt had been within the limits prescribed to himself by the Editor, so that we might have had the benefit of his learning and industry in respect to an important act not hitherto annotated, but when we have so much it is scarcely fair to expect more, and though it would have made the work more complete, it does not form part of the original Common Law Procedure Act, as annotated by Mr. Harrison in his first edition.

The above observations suggest the question

—Why do not some other members of the profession, especially among the juniors, take up this or some other act and collect and arrange the cases bearing upon it. Young men in England bring themselves into notice by such a useful and beneficial occupation of their spare time as this; and now that the profession is filling up so fast, and the competition becoming greater, the industrious and the ambitious will in this, as in other ways, come to the front.

A table that precedes the work gives each section of the English Common Law Procedure Acts and the corresponding section of the Canadian Act. This will be of much use as well to English as to Canadian Subscribers, and adds much to the completeness of the volume.

The Editor in the preface acknowledges the assistance received from Mr. F. J. Joseph, who superintended the passing of the work through the press, and who verified all the cases to which reference is made in the notes; and this has been done with the most commendable care, patience and exactitude. The preparation of the Index was entrusted to Mr. Wethey, and is full and reliable.

This is but a short notice of the second edition of a book of the practical importance that this is to the profession here, but it is really unnecessary to say more, or further to examine the contents of the volume, when it is already in the hands of the bulk of our readers; if any have it not, it is because their business is not sufficient to make it of importance to have the proper material to carry it on with ease or safety; but the workers amongst us have for some years been looking for and hoping soon to see the work now before them, and though expecting much have not been disappointed.

AMERICAN LAW REVIEW. April, 1871. Boston: Little, Brown & Co., 110 Washington Street.

The contents of this number are as follows: The North Eastern Fisheries; Expert Testimony; The Bar Association of the City of New York; Digest of the English Law Reports; Selected Digest of State Reports; Digest of Cases in Bankruptcy; Book Notices; List of Law Books Published in England and America since January, 1871; Summary of Events; Correspondence, &c.

REVIEWS.

The first is a long and well written, but to our minds not a convincing article, containing some rather startling propositions on a subject which has been already largely discussed in all its bearings.

The reviewer commences by referring to the following provisions of the different treaties relating to the subject:—

Article III. of the treaty of peace, concluded Sept. 3, 1783, is in these words:

"It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulf of St. Lawrence, and at all other places in the sea where the inhabitants or both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coasts of Newfoundland as British fishermen shall use, but not to dry or cure the same on that island; and also on the coasts, bays and creeks of all other His Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, Magdalen Islands and Labrador, as long as the same shall remain unsettled; but as soon as the same, or either of them, shall be settled, it shall not be lawful for said fishermen to dry or cure fish at such settlement without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground."

The writer then goes on to say:—

"The treaty of peace signed at Ghent, Dec. 24, 1814, was silent upon the subject of the fisheries. A correspondence soon thereafter arose, in which the American Government maintained the position that all the rights secured to citizens of the United States in 1783 were still subsisting, notwithstanding the intervening war of 1812; while the British cabinet insisted that all these liberties were swept away at the outbreak of hostilities between the two countries. The convention signed at London, Oct. 20, 1818, was the result of these opposing claims. Article I. thereof is as follows:—

"Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that the inhabitants of the said United States shall have for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of

any kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coasts of Newfoundland from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbors, and creeks from Mt. Joly on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast. And that the American fishermen shall also have liberty for ever to dry and cure fish in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland, hereinbefore described, and of the coast of Labrador: but as soon as the same, or any portion thereof, shall be settled, it shall not be lawful for said fishermen to dry or cure fish at such portion, so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce for ever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America, not included within the above-mentioned limits. *Provided*, however, That the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter, of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as shall be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby secured to them."

Article I. of the "reciprocity treaty," signed June 5, 1854, so far as it is important to quote, is as follows:—

"It is agreed by the high contracting parties that, in addition to the liberty secured to the United States fishermen by the above-mentioned convention of Oct. 20, 1818, of taking, curing and drying fish on certain coasts of the British North American colonies therein defined, the inhabitants of the United States shall have in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind except shell-fish on the sea coasts and shores, and in the bays, harbors, and creeks of Canada, New Brunswick, Nova Scotia, Prince Edward's Island, and the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the coasts and shores of those colonies and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish. *Provided*, That

REVIEWS.

in doing so they do not interfere with the rights of private property or with British fishermen."

"Article V. provides that the treaty is to remain in force ten years after it goes into operation, and further until twelve months after either party gives a notice terminating the same. It was terminated in March, 1866, by the United States Government."

After stating his views of the rights of American fishermen upon the basis of the treaty of 1818, the writer goes on to argue that the effect of Article III. of that treaty, which he calls a renunciatory clause on the part of the United States, was removed by the reciprocity treaty of 1854, although the latter was abrogated by the American government itself, as already stated. The argument used is ingenious, but the same reasoning would seem to prove not only that the treaty of 1818 was at an end, but also that of 1783, which would of course be proving rather too much. In fact, considering all the circumstances and the motives leading to the repeal of the Reciprocity Treaty, the position taken on behalf of the Americans, is not altogether unlike that of an individual taking advantage of his own wrong—a course of procedure which has become chronic with the government of the United States, and which they seem to think has become legalized for their benefit, by custom and prescriptive right.

The conclusion at which the writer arrives is doubtless sufficiently satisfactory to his readers in the United States:—

"Article III. of the treaty of 1783, is therefore in the nature of an executed grant. It created and conferred at one blow rights of property perfect in their nature and as permanent as the dominion over the national soil. These rights are held by the inhabitants of the United States and are to be exercised in British territorial waters. Unaffected by the war of 1812, they still exist in full force and vigor. Under the provisions of this treaty American citizens are now entitled to take fish on such parts of the coasts of Newfoundland as British fishermen use, and also on all the coasts, bays, and creeks of all other of his Britannic Majesty's dominions in America, and to dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, the Magdalen Islands and Labrador."

We trust that the labours of the Joint High Commission at Washington may make the dispute between the countries matter of historical interest rather than a source of irritation.

In this number is concluded an instructive article on Expert Testimony, which we recommend to our readers.

The next article on the Bar Association of New York commences with the following observations on democracy, as it affects and is controlled by the legal profession:

"If men," says De Tocqueville, 'are to remain civilized, or to become so, the art of associating together must grow and improve in the same ratio in which the equality of conditions is increased,'—a truth which lawyers in America have strangely overlooked. It may be a question indeed whether the legal profession and the community both have not lost more than they have gained by the application of modern theories of equality, which strip that calling of the character of a guild. It might be better for itself, and consequently for society, that the bar should retain something of the corporation form it preserves under older governments, with clearly defined obligations, and with enough of privilege for its due protection against attacks from without and decay within. No order that has ever existed has made a less aggressive use of such privileges. When Coke of England asserted the lawful authority of the courts against the pretensions of the prince, and when the robe demanded and enforced justice against the member of the proud French nobility who had wronged one of their rank, they were defending popular liberty in their own cause. In other countries the lawyer still feels himself surrounded by a powerful body which guards his rights, and holds him responsible for his conduct. In America, the legal profession is less protected by statutes and customs than by the traditional respect which yet lingers about it; and its separate members are but little more controlled for good or ill by the force of its authority as a body, than laymen in general are.

"Lawyers are rightly called the most conservative class in a democracy, and their influence in the government pronounced to be the most powerful existing security against its excesses. It follows that the class of politicians who profit by those excesses must be hostile to the legal profession, and the antagonism is none the less real for being unavowed. The people are never jealous of lawyers; they trust the legal profession, because its interest is really the same with their own, and because its intelligence guides them best in pursuing that interest. In so doing it thwarts the demagogue, whose interest it is to flatter passion or vanity. The French publicist held the opinion that lawyers would always maintain the lead in a democracy. He could not forecast the influences which in the last quarter

 APPOINTMENTS TO OFFICE—TO CORRESPONDENTS.

of a century have so enormously increased the control of mere politicians; he did not foresee that they would master the art of association more thoroughly than any other class in the community, and turn their power of combination to the worst account; that they would crawl up from being the flatterers of the people to being its leaders; and that within a very few years from the date of his studies they would have moulded the brute force of numbers by the aid of general suffrage, and raising association to the height of conspiracy, would have usurped the legislation of the country. And holding that power, the secret instinct of antagonism impels them to use it against the legal profession, by taking advantage of popular distrust of all class distinctions.

"The democratic principle is a slow, strong solvent of forms and symbols,—so strong, that it may even be artfully misdirected to attack the substance and weaken the reality of the thing symbolized. Therefore much of the democratic teaching of the day encourages a sort of unformed notion that the destruction of class peculiarities will have a magical power to efface differences of nature, and make all men alike wise, good, and happy. Such a notion easily breeds the mistake of regarding superior morality and intelligence as an unwarranted privilege. Any eminence is undemocratic, the Cloon of the hour exclaims; superiority of any kind is treason to the great Declaration; and any calling or profession that rests upon such superiority, and maintains and protects itself by cherishing it, is unconstitutional, or we will speedily make it so. And as a result, so far as legislation can effect it, the mere fact of having been born twenty-one years ago, gives a man a right to demand admission to a learned profession. Is the bogtrotter or the Five-Pointer raised by that to the level of worth, or is the profession dishonored by being compelled to stoop to his?"

CANADIAN ILLUSTRATED NEWS. George Desbarats, Montreal.

Amongst the recent numbers of the *Canadian Illustrated News* is one which contains some excellent pictures of the marriage ceremony of Her Royal Highness Princess Louise and the Marquis of Lorne. We are glad to see that a Canadian Illustrated Journal has achieved such a measure of success, and we certainly think that M. Desbarats, the very enterprising Editor, deserves the thanks of the community for having projected and kept up this paper, which bids fair at no dis-

tant day to rival the *Illustrated London News* or the *Graphic*. There is no doubt but that M. Desbarats paper far surpasses any of the Illustrated Journals of our American neighbours, and should be well encouraged, which will tend further to its improvement.

 APPOINTMENTS TO OFFICE.

REFEREE IN CHAMBERS.

THOMAS WARDLAW TAYLOR, of the City of Toronto, Esquire, Barrister-at-Law, to be Referee in Chambers of the Court of Chancery for Ontario. (Gazetted February 25th, 1871.)

NOTARIES PUBLIC.

PETER PURVES, of the Town of Brantford, Gentleman, Attorney-at-Law. (Gazetted January 14th, 1871.)

FRANK C. DRAPER, and WILLIAM MULOCK, of the City of Toronto, Esquires, Barristers-at-Law, and BENJAMIN V. ELLIOT, of the Village of Exeter, Esquire. (Gazetted January 28th, 1871.)

STEPHEN GIBSON, of the Town of Napanee, JAMES WATSON HALL, of the Town of Guelph, and JOHN ELLEY HARDING, of the Village of St. Marys. (Gazetted February 4th, 1871.)

WILLIAM HENRY BARTRAM, of the City of London, Gentleman, Attorney-at-Law. (Gazetted 18th Feb., 1871.)

WILLIAM LYNN SMART, of the City of Toronto, Esquire, Barrister-at-Law, JOHN MCCOSH, of the Town of Paris, Gentleman, Attorney-at-Law, and JAMES W. MARSHALL, of the Township of Euphrasia. (Gazetted 4th March, 1871.)

WILLIAM NORRIS, of the Town of Ingersoll, GEORGE MARTIN RAE, of the City of Toronto, GEORGE DENMARK, of the Town of Belleville, Esquire, Barrister-at-Law, FRANCIS W. LALLY, of the Town of Barrie, WM. BOGGS, of the Town of Cobourg, Gentlemen, Attorneys-at-Law, and DAVID EWING, of the Village of Dartford. (Gazetted 11th March, 1871.)

JAMES LAMON, of the Village of Uxbridge, and GEO. SIMMIE PHILIP, of the Town of Galt, Gentlemen, Attorneys-at-Law. (Gazetted 25th March, 1871.)

WILMOT RICHARD SQUIER, of the Town of Goderich, GEORGE MOUNTAIN EVANS, of the City of Toronto, and JAMES ALEXANDER McCULLOCH, of the Town of Stratford. (Gazetted 8th April, 1871.)

SAMUEL SKEFFINGTON ROBINSON, of the Village of Orillia, Gentleman, Attorney-at-Law. (Gazetted 15th April, 1871.)

EDMUND HENRY DUGGAN, of the Village of Meaford, and MICHAEL HEUSTOPF, of the Town of Chatham, Esquires, Barristers-at-Law. (Gazetted 22nd April, 1871.)

THOMAS DAWSON DELAMERE, of the City of Toronto, WM. MCKAY WRIGHT, of the City of Ottawa, Esquires, Barristers-at-Law, and JOHN R. ABKELL and FRANCIS CLEARY, of the Town of Windsor, Attorneys-at-Law. (Gazetted 29th April, 1871.)

 TO CORRESPONDENTS.

We must remind "Law Student" and "W. O. H." that our invariable rule is not to insert letters unless accompanied with the name of the writer, not necessarily for publication, but as a guarantee of good faith.

WITNESS FEES TO REGISTRARS.

DIARY FOR JUNE.

1. Thur. Open Day.
2. Frid. New Trial Day, Q. B. Open Day, C. P.
3. Sat. Easter Term ends. Open Day.
4. SUN. Trinity Sunday.
5. Mon. St. Boniface.
6. Tues. Last day for notice on trial for County Court.
8. Thur. Corpus Christi. [except York.
11. SUN. 1st Sunday after Trinity. St. Barnabas.
12. Tues. General Session and County Court Sitting in each County except York.
14. Wed. Last day for Court of Revision finally to revise Assessment Roll.
15. Thur. Last day for service of summons, County Court.
18. SUN. 2nd Sunday after Trinity. [York.
20. Tues. Accession of Queen Victoria, 1837.
21. Wed. Longest day.
24. Sat. St. John the Baptist.
25. SUN. 3rd Sunday after Trinity.
26. Mon. Last day to declare for County Court, York.
29. Thur. St. Peter.

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JUNE, 1871.

WITNESS FEES TO REGISTRARS.

Registrars of titles are as a class exceeding-ly tenacious of their rights. By united efforts they have succeeded at different times in moving the Legislature to action, and we have had amendment of the Registration laws following upon amendment thereof. But these functionaries seem to have left unprovided for the matter which constitutes the heading of this paper.

By the late Ontario Act, 81 Vic. c. 20, s. 21, it is enacted that no Registrar shall be required to produce any paper in his custody unless ordered by a judge, upon which order a subpoena is to be issued in the usual way. This is in effect a statutory repetition of the rule of court: *Reg. Gen. T. T. 1856, No. 81*. But the act says nothing about the fees to which the officer shall be entitled upon the service of such subpoena, and to our certain knowledge no small squabbling has arisen at various trials to determine whether 75 cents or \$4 was properly claimable for the *per diem* allowance.

The matter must be settled by reference to the rules of court regulating the allowance to witnesses. At common law the tariff fixed by the judges in pursuance of the Common Law Procedure Act, governs the practice. By that tariff the only persons entitled to receive \$4 a day are, (1) barristers and attorneys, physicians and surgeons, and then only when called upon to give evidence

in consequence of any professional service rendered by them, or to give professional advice; and (2) engineers and surveyors, and then only when called upon to give evidence of any professional services rendered by them, or to give evidence depending upon their skill or judgment. In all other but these exceptional cases witnesses are entitled to no more than 75 cents if residing within three miles of the court house, and \$1 if residing over three miles therefrom. These rules are binding upon individual judges, and nothing short of a rule of the full court either special, in the particular suit, or general, regulating the whole practice, can entitle any person to a larger allowance. We find it stated in *Re Nelson*, 2 Chan. Cham. Rep. at p. 253, that in a case of *Ben-net v. Adams* in 1859, Richards, C.J., ordered \$4 to be taxed to a clerk of Assize who attended to give evidence in that capacity as a witness. So far as we can judge this order if appealed against would have shared the fate of the orders made by one judge for extra counsel fees, as determined by the full court in *Ham v. Lasher*, 27 U. C. Q. B. 857.

In Chancery the practice has been, both in England and Canada, to follow the Common Law tariff in the allowance to witnesses,—a matter of some surprise, considering the independent position which this court usually occupies (see *Clark v. Gill*, 1 K. & J 19). We find, however, in the case already referred to, *Re Nelson*, that the Common Law tariff is departed from. Special reasons are given by the late Chancellor for making a \$4 allowance per day to the Registrar of the Surrogate Court.

This case is the stronghold of all public officers attending court under subpoena, and we shall therefore advert to the several reasons given for the extraordinary allowance. It is said (1) that the responsibility of the officer's position in keeping, searching for, and producing original documents should be regarded; (2) the trouble and loss of time in addition, which often occurs in searching for and producing such documents; (3) that in the case of an officer paid by fees, as he may be kept hours waiting in court before being called, he should be remunerated by a larger fee than is paid to ordinary witnesses. Now we do not doubt the power of the Court of Chancery, or a single judge of that court, to make special orders for the allowance of

WITNESS FEES TO REGISTRARS—LAW SOCIETY; EASTER TERM, 1871.

extra witness fees, but we submit that it would be beyond all measure better so to regulate the tariff that all occasion for making special orders should be done away with. By this means also the proper sum would be taxed or paid in the first instance, and the trouble and expense of an appeal from taxation, or of an application for a special allowance, would be avoided.

We do not quarrel with extra compensation being made to all public officials who attend as witnesses, if the courts think fit to alter the tariff in that respect, but while there is a tariff it should be adhered to. Now we do not see that, in principle, *Re Nelson* is sustainable as laying down a general rule, applicable, for instance, to registrars of titles. Apart from rules of court, the practice here would be governed by the old Statute 5 Eliz. c. 9, s. 12, and under that the principle is that the witness is not entitled to any thing for loss of time. He is entitled to travelling expenses, and if he is away from home for some time he is entitled to his expenses for maintenance during that time: *Collins v. Gregory*, 1 B. & Ad. 950; *Collins v. Godfrey*, 1 B. & Ad. 950; *Nokes v. Gibbon*, 3 Jur., N. S., 282; s. c. 26 L. J. Ch. 208; *Loneragan v. Royal Exchange*, 7 Bing. 781.

In this country there is no Chancery tariff for witness fees; the Common Law tariff is against the special allowance we have been considering, and in the old law underlying the tariffs, responsibility, trouble and loss of time, and loss or diminution of official fees form no ground for compensation.

Again we say that if the judges decide that public officers should receive the fees awarded to professional witnesses when called to give professional evidence, we shall be the last to object to such a scale of compensation. But one cannot fail to see that the whole force of the reasoning in *Re Nelson* would warrant the payment of extra fees to every professional or scientific man called as a witness upon any point,—for what doctor, surveyor or lawyer, is ever subpoenaed who does not aver that he is losing money in attending as a 75 cent witness?

It would be very proper to have a general overhauling of the tariff as to witness-fees. We doubt not, if the Registrars unite their exertions once more, that the thing will be done. It would be a breach of professional

modesty for lawyers to move in the matter, doctors have too much internecine warfare to attend to, surveyors do not seem to possess sufficient vitality to agitate: it rests upon the harmonious, well-disciplined, aggressive band of Registrars to make the onslaught.

LAW SOCIETY—EASTER TERM, 1871.

BENCH AND BAR.

During this Term the time of those of the Judges on the rota for the trial of election petitions under the late act has been much occupied with hearing various applications for particulars and other motions thought necessary to prepare election cases for trial. The Chief Justice of the Common Pleas has especially devoted much time and careful attention to these matters, and is gradually moulding a practice following in the main the English cases, though differing in some respects where the English practice seems to work harshly.

During this Term the Hon. J. H. Cameron, an *ex-officio* Benchman, was unanimously re-elected by his newly appointed coadjutors under the recent Act, to the position he has worthily filled for many years, as Treasurer of the Law Society. Several committees of the Benchers have been formed to do the work of the Society, with the object of doing it more efficiently and at more convenient times than formerly; but so far there has not been much improvement in the attendance at Convocation. The Benchers have decided on publishing their advertisements in the *Law Journal*, instead of the *Gazette*, and the first is published in this issue—a change which we trust will not be displeasing to those interested.

Various prominent members of the Bar are off on their summer trip, and more will follow, though several will be detained for some time by the trial of election petitions, some half dozen of which will be tried before Vacation.

CALLS TO THE BAR.

During this Term the following gentlemen were called to the Bar:

Messrs. John Crerar, Hamilton; George O. Alcorn, Toronto; D. McGibbon, Milton; W. G. Falconbridge, Toronto (without an oral); J. Muir, Toronto; John Taylor, Ottawa; W. H. Fuller, Simcoe; John S. Ewart, Kingston; John L. Lyon, Ingersoll; D. T. Duncombe, Simcoe; J. C. Donaldson, Galt; W. McDowell, Kingston; W. H.

CRITERIA OF PARTNERSHIP.

Bartram, London; J. Masson, Belleville; G. W. Badgerow, Toronto.

ATTORNEYS ADMITTED.

The following gentlemen were admitted as Attorneys:

Messrs. Alcorn, Crerar, Falconbridge, Duff, Secord, Lyon, Fuller (without oral), Moone, H. C. Gwyn, Greenlees, McCraney, Malone, R. Roblin, VanNorman, McDonald, Campaign.

Mr. Rowe also passed the examination, but cannot be admitted this Term, on account of a defect in the filing of his articles.

A word to the wise. There is such a thing as too much attention to external adornment, but we much doubt if this fault can be attributed to all of those who, during several Terms past, have presented themselves before the Courts to be sworn in as attorneys. This at least we know, that some of the judges have remarked upon the slovenly appearance of several of those who came before them. The occasion is surely of so much moment to those concerned—the commencement of a life long struggle for honor and distinction—as to call for a little extra neatness in attire; something we might suggest in accordance with what is expected of a barrister in court costume, with the exception of the gown and white necktie.

INTERMEDIATE EXAMINATION.

The intermediate examinations have resulted as follows:

Fourth Year.—Maximum, 240. Mr. Watson, 237; W. McDiarmid, 208; J. Roaf, 198; Cryslar, 191; Roberts, 191; Laton, 191; S. S. Wallbridge, 191; Ball, 189; Payne, 184; Johnston, 182; N. N. Hoyles, 180; J. Barron, 175; Poussette, 174; Lloyd, 167; H. Hill, 163; Carman, 160; Bogart, 158; McPherson, 151; Brennan, 148; Mickle, 139; Malcolm, 135; Lees, 133; O'Brien, 124; R. Gamble, 122.

Third Year.—Maximum, 240. F. E. P. Pepler, 235; Dennistoun, 186; C. O. Z. Ermatinger, 176; Gordon, 173; T. Baines, 170; H. A. Reesor, 169; Kirkpatrick, 168; McKinnon, 163; McBride, 161; Ross, 159; Grote, 152; Lennox, 150; Murdoch, 147; A. E. Richards, 144; McDonell, 142; W. F. Burton, 133; T. Daly, 128.

These results are most satisfactory, and prove that the Act is accomplishing its purpose. We especially congratulate Messrs. Watson and Pepler on the stand they have taken—one which has never before been attained, and which reflects the very highest credit upon their ability and industry.

SELECTIONS.

CRITERIA OF PARTNERSHIP.

(Continued from page 133.)

A community of interest in the profits of a joint undertaking or business is said to be essential to the existence of a partnership; but this is true only so far as the manner in which the profits are taken serves to evidence and explain the contract between the parties. Profits being therefore the proper subject of partnership property, it is only requisite to inquire into the mode of participation, in order to determine whether the party interested is a partner or not. Suppose C. is suspected of being a partner with A. and B., by what proof is the fact established? A mere participation in the profits is not alone sufficient to charge him, for the mode of participation may be such as to prove directly the contrary. It must be shown that the supposed partner is in the same relation to the creditor that the known partners are; that is, they must all be immediate debtors to the partnership creditor for a joint benefit conferred simultaneously and directly upon them by the creditor. A. and B. are liable because they have received a benefit directly from the use of the creditor's property; and inasmuch as it is a joint benefit derived from a joint use and disposition of that property, the law attaches to them the joint liability of partners which, *ex hypothesi*, they have expressly assumed. Hence if C. can be shown to have a similar interest in the profits and thereby to sustain a similar relation to the creditor, it follows, as a matter of course, that he is liable in the same manner and to the same extent as the other partners are, and is himself a partner. In other words, the supposed partner must have the same privity of relation to the creditor that all the other partners have. And hence instead of saying "that he who shares in profits indefinitely, is liable as a partner to creditors, because he takes from that fund which is the proper security to them for the payment of their debts," it seems more accurate to say—because by having in the profits an interest similar in character to that of the other partner or partners, he has enjoyed a benefit conferred directly upon him by the creditor, and thereby through an implied contract, becomes as much his debtor, as the party or parties already known to be so indebted.

How, then, is this privity to be ascertained? We answer—by showing that the profits are derived from a joint benefit moving immediately from the creditor to all the parties to be charged; or, what is the same thing, by proving that the interest of the party who ostensibly receives, and the interest of the party who actually shares the benefit or profits, are homogeneous;* that is, subsisting

* The words *homogeneous* and *homogeneity* strike us as far more accurate and convenient expressions for indicat-

CRITERIA OF PARTNERSHIP.

in the same right and in the same subject-matter. Otherwise the contract cannot be presumed as between the supposed partner and the partnership-creditor.

The view here taken justifies the reasoning of Lord Eldon in *Ex parte Hamper*, 17 Ves. 404, where he makes a distinction between a stipulation for a proportion of the profits as a compensation for labor, skill or services, and an agreement to receive a sum of money equal to such a proportion of the profits and actually paid out of them; holding that the former constituted a partnership and the latter did not. And the distinction is obvious notwithstanding Mr. Justice Bramwell thought there was no "difference except in words, at least so far as creditors are concerned." *Bullen v. Sharp*, L. R. 1 C. P. 126. The real difference consists in the different legal consequences of the two contracts. Where the agreement is to receive a proportion of the profits in consideration of services, these latter are to be regarded as component parts of the partnership stock belonging to, and being under the control of the firm, and the party who contributes them is thereby made a partner, in the absence of any special restriction to the contrary. While he labors to produce profits for others, he is at the same time producing them for himself and thus he has the same interest in his own services, as if he contributed only *money* to the partnership stock and bore his share of the expense which the firm would have to incur if it employed the labors of a hired servant, instead of his own. Moreover he derives his interest directly from the joint use of the partnership stock and is therefore an *immediate* debtor to the partnership creditor. But where it is expressly agreed that a sum of money *equal* to a proportion of the profits should be paid as a *reward* for services, the very words forbid the supposition of a partnership and merely provide a contingent measurement for the compensation to be paid, the payee not sharing the direct use and control of the partnership property, but receiving his interest through an intermediate party in whom the *ownership* had previously vested. And here we have an illustration of Mr. Parsons' favourite criterion of "ownership in the profits before they are divided" deduced from a rule which he himself denies.

But our conclusion as to the necessity of *homogeneity* in the interests of the parties as above explained, in order to create the partnership relation as to third persons as well as *inter se*, is only the ultimate development of the reasoning upon which the case of *Cox v. Hickman* was decided. The case was substantially as follows:—a manufacturing concern being heavily indebted conveyed all their property to trustees to carry on the business

and out of the profits to pay off the debts. The trustees, in process of time, became involved, and *their* creditors attempted to fix a joint liability with the trustees upon the other creditors because they received the profits. But every consideration of common sense and common justice plainly urged the repudiation of a rule which led to so absurd a consequence, and the court realizing the necessity of finding some escape from its extravagant conclusions, boldly renounced and attacked the rule itself, holding that inasmuch as the trustees could not be regarded technically as the *agents* of the first creditors in contracting the subsequent liabilities, no partnership existed between them.

The necessity of founding the partnership liability upon a *direct and immediate contract* with the creditor, is thus distinctly recognised. The party to be charged *must* be shown to have made a contract, and if it does not appear that he contracted in person, the next naturally and logically is, did he make the contract through an agent? If neither, then he is not liable as a partner.

So there must be an *identity of relation* between the supposed partners in respect to the creditor, and hence the newly adopted rule requires that the relation of principal and agent shall be *mutual*, so that the contract of one shall be the contract of both.

Whether the party actually contracting should be regarded as an agent *quoad hoc* is a question not more easily answered in many cases than the question of partnership itself, and herein, anywhere, the insufficiency of the rule is exposed.

Reasoning upon the principles which we have contended for above, in their application to the case in question, it would appear that the relation of the *first* creditors and that of the trustees to the *subsequent* creditors were entirely different, and the difference is too obvious to be specifically point out. The legal title and actual ownership of the profits was in the trustees intervening between them and the first creditors, and so the legal ownership of the profits was likewise in the trustees, before they were actually paid over to the beneficiaries under the deed. There was no immediate relation or privity, and consequently no contract between the first and second creditors because the benefit conferred by the subsequent creditors did not move *directly* but *mediately* through the trustees, to the former creditors. The interest of the first creditors and that of the trustees not being homogeneous, the relation of partnership did not exist between them.

As a matter of course, many of the old adjudications will be found erroneous in the light of these later decisions, but it is useless to go into a consideration of them. Mr. Parsons, after citing numerous cases, admits the very manifest "difficulty, if not impossibility, of drawing from the decisions any definite principle, or rule applicable with certainty to

ing the interest of partners than the words *common and community*, which are usually employed for that purpose. This may have been the idea of Mr. Parsons when he said "the distinction taken is between different *kinds* of interests in or claims upon profits." *Para. Part. 75*, is note.

CRITERIA OF PARTNERSHIP.

the question, who are partners as to third persons?"

All the cases where there is no express contract of partnership among the parties, may be reduced to the following formula:—

A contract between A. and B., C., having a legal claim against A., assumes that B. is subject to the same liability by reason of his contract with A.:

In construing the agreement between A. and B., the real question is, whether or not it raises the presumption of a contract between B. and C. According to the rule of *Cox v. Hickman*, it must appear that A. was the agent of B. in contracting the debt to C., and the agency is sufficiently proven by showing that the trade carried on by A. was in fact carried on in behalf of A. and B. We think the proposition is better stated thus:—A. being indebted to C. for a benefit moving directly and simultaneously from C. to A. and B., the same cause which makes A. a debtor necessarily makes B. a debtor also, and therefore they are partners.

In *Hesketh v. Blanchard*, 4 East 144, Lord Ellenborough held, in accordance with the prevailing doctrines on the subject, that a man might be a partner as to third persons, though so far from being a partner with his immediate contractor, that he might bring an action against him on their contract. This class of cases is thus disposed of by Bramwell, J., in *Bullen v. Sharp*, *ubi sup.* 124:—"Partnership means a certain relation between two parties. How, then, can it be correct to say that A. and B. are not in partnership as between themselves, they have not held themselves out as being so, and yet a third person has a right to say they are so as relates to him? But that must mean *inter se*, for partnership is a relation *inter se*, and the word cannot be used except to signify that relation." Now the "relation *inter se*" must always depend upon the contract *inter se*, and place the parties in the same relation to the creditor, for otherwise A.'s contract with C. cannot be B.'s contract with C.

There is a class of cases where the contract between A. and B. (adopting the foregoing formula) is one of bargain and sale, and the stipulation for profits is only intended to designate a mode of paying the price. The case of the bargain for a house* stated by Mr. Parsons is one of this kind, and shows to what extravagant lengths the rule of *Waugh v. Carver* may be carried. The idea of a partnership between A. and B. in such a contract as this, we venture to say, would never have entered any reasonable mind that was

not misled and prejudiced by the unwarranted significance with the word *profits* gradually acquired on the authority of judicial interpretation.

The case of *Barry v. Neaham*, 6 C. B. 641, may be cited an illustration, and the following arrangement will simplify the meaning of the contract.

1. There was a sale of a newspaper by B. to A. for £1,500, payable in seven annual instalments; 2. B. guaranteed A. a clear annual profit of £150; 3. A. agreed in consideration thereof to pay B. all the profits in excess of the £150, until they reached the sum of £500; 4. If the surplus profits should amount to £500 during the seven years the instalments had to run, then A. agreed to pay in addition to what he had already promised, the existing liabilities of the paper, not exceeding £250; 5. B. should receive such surplus profits only until they amounted to £500; 6. A. might pay off all the purchase-money, assume all the liabilities of the paper, and become entitled to all the profits at any time; 7. B. might withdraw his guaranty of £150 at any time.

The question was whether B. was liable as a partner for goods supplied to the newspaper on A.'s order, and the court held that he was, on the ground that he was still the owner of the owner, and participated in the profits, as stated in the opinion of Maule, J.

Now, if B. continued to own the paper there can be no doubt of his liability for its debts; but whether as a partner or not, is another question. For if there was no sale, A. was in fact nothing more than a "salaried agent receiving a definite sum out of the profits as a compensation for services," and in this case he could have no interest in the surplus profits. But it seems that there was a sale, that all the subsequent stipulations had reference only to the mode of payment, and that the surplus profits did actually go to help pay what A. owned B. Nor was payment confined to profits alone, for A. might at any time have paid the whole price and become entitled to all the profits, or B. might have withdrawn the guarantee, and in either case there would have remained a simple undisguised contract of bargain and sale. It was not even a conditional sale, for B. retained no ownership in or claim upon the newspaper, nor was there a provision that he should take it back in any contingency.

If he was a partner then, it was because of the agreement that a third of the debt (£500) might possibly be paid out of the profits, and we say possibly, for this part of the agreement might have been rescinded. Was the mode of participation viewed in connection with all the circumstances, such as to constitute a partnership between A. and B.? We conclude that it was not, and we do so with the less hesitation because the decision of this case was expressly founded on the principle of *Waugh v. Carver*. Wightman, J., in *Cox v.*

* If two men were bargaining for a house and the seller says, "Your business is so prosperous, you can afford to pay me all I ask;" and the buyer replies, "You mistake, the profits of my business are not so large as you think;" and the seller rejoins, "Well, I will, at all events, take one-fourth of your next year's profits for the house," and a written contract is executed on these terms, it would be simply absurd to contend that this sale of a house made the seller liable for all the business debts of the buyer: *Parsons on Part.* 71.

CRITERIA OF PARTNERSHIP—THE ELECTION BILL AND THE PROFESSION.

Hickman, said: "I great doubt whether the creditor who merely obtains payment of a debt incurred in the business by being paid the exact amount of his debt and no more, out of the profits of the business, can be said to share the profits;" and the proposition that if one "limits his claim to be paid out of profits only, his limited right to payment creates an unlimited liability" was pronounced by Pollock, C. B., in another case, "unjust, absurd and at variance with natural equity." These *dicta* seem to settle the rule which governs such cases. Here B. was in fact a creditor, not of the supposed firm, but of A. individually; the debt was not even "incurred in," but was preliminary to, the business, and the application of profits being for the payment of an existing debt, there was not such a participation as to establish the relation of partners, between A. and B.

Applying our own reasoning to the case, it appears that the interests of the parties in the profits were not homogeneous, for all the profits belonged primarily and exclusively to A., as the fruit of his own capital and labor. B.'s interest in the profits—if he can be said to have an interest therein—was the result of a distinct and independent contract with A. and not of any implied contract with A.'s creditor. Under the existing agreement B. had no lien on the profits, but only a right of action against A. for so much as they were worth; consequently these interests did not subsist in the same right or necessarily in the same subject-matter, and therefore there was no partnership between them.

There is a class of cases where the contract between A. and B. is continuous on both sides and contains a provision for the continued payment of profits. Here, as in other cases, the relation of the parties must be gathered from the whole contract, and not postulated by mere force of the word *profits*.

In *Ex parte Langdale*, 18 Ves. 800 (in terms of the formula), it appears that A., the bankrupt, had kept a canteen, and that B. was a manufacturer of beer. The statements of the parties were conflicting: A. represented that half his shop-rent was paid by B. in consideration of A.'s paying him 17s. per barrel of beer out of the profits. B. stated that he paid half the shop-rent and A. in consideration thereof paid him £4 5s. per barrel for beer, while other customers paid only £3 8s. Lord Eldon sent the case to a jury to determine "whether this was an agreement for a division of the profits, or B. stood only in the relation of a vendor of beer to this retailer at £4 5s. per barrel, in consideration of paying half his rent, selling to others at £3 8s." Now, if we seek to apply the rule of *Cox v. Hickman* to this case, we find it just as difficult to say whether A. and B. were mutually principal and agent, as it is to decide as an original question, whether they were partners or not. We shall not undertake to solve the problem, but will leave it to suggest its own solution, in

the belief that this article has already exceeded its proper limits.

The reasoning contained in the foregoing observations may not *always* be capable of easy and useful application, still there may be many cases in which it will facilitate the solution of the main question the lead to satisfactorily conclusions. And especially is this likely to be true in cases of annuities and loans, or in cases like that of *Cox v. Hickman*, where it may be important to show that the liability is completely exhausted in some intermediate party and consequently cannot reach beyond. For as we have seen, the person to be charged must be a party to a contract either express or implied, and where it is not expressed and cannot be inferred from the actual relations of the parties, there can of course be no contract and by consequence no liability. S. D. DAVIES.

—*American Law Review*.

THE ELECTION BILL AND THE PROFESSION.

The ballot makes personation easy and detection difficult; it vastly facilitates the process of bribery, by removing the fear of discovery and punishment.

Bribery will not be prevented by merely moral influences—that is proved by all experience. No party hesitates to resort to it when necessary to success. No man, however virtuous in profession, was ever known to vote against his party because they were winning by corruption; he is content to share the spoils of victory and ask no questions. In very truth, nobody really looks upon it as a crime or upon a man who gives or takes a bribe as he views a thief. Everybody would prefer to win an election by honest means, but he would prefer to win by bribery rather than be beaten. Nothing but fear of the penalties really operates to deter, and even they go no further than to introduce more contrivance and caution in the conduct of the business. Whatever reduces the risk of discovery enormously increases the temptation alike to give and to take bribes.

It is scarcely denied that the ballot makes bribery comparatively easy and safe; but its advocates contend that, though it will not make men less willing to take bribes, it will make them less ready to offer bribes, because they cannot secure the fulfilment of the corrupt contract. Voters, it is said, will accept bribes from all, and promise all, and can only give to one; a man who will take a bribe will not hesitate to break his promise. This argument, however, assumes much that is not true in fact. The truth is, as our readers very well know, the great majority of the voters who take bribes perform their contracts faithfully. There is a strange point of honour among electors in this matter. They do not look upon the taking of a bribe as a moral, but only as a legal, offence; in their estima-

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tion there is nothing wrong in it, and it is only a question of safety from penalty. They think it very wrong to break a promise, and not one in twenty of those who accept a bribe without shame and without the most severe pricking of conscience vote otherwise than they had agreed to vote for the consideration given.

It must not, therefore, be hoped for that bribery will be diminished under the ballot, because the buyer will be unable to secure the vote he has bought. Even if individual votes could not thus be counted on, another form of bribery, practised largely in America, will certainly be adopted here. Wherever the ballot exists, bribery is conducted thus: Clubs, workshops, societies of men, sell themselves, not individually, but in the mass. The negotiation is conducted between a trusted man on both sides. It is intimated that the society will vote together; what one does all do; little is said, but much is understood; signs are more expressive than words: under a stone in a field, in a hole in a hedge, the representatives of the society after the conference with the Man in the Moon find a certain sum of money. It is divided among the members, and the ballot of all is for the same man. If it be asked how they can be trusted, the answer is, that they well know that if they were to prove false they would soon spoil the market. But if there is a fear of such a consequence, the last resort is to buy conditionally that the buyer is returned,—the purchase-money not being paid till after the election.

This is not a theoretical evil, but one rampant at every election in the United States, and as familiar to the people there as was the head money to the electioneers of twenty years ago in this country.

The ballot will practically extend the area of corruption by providing facility for concealment of the facts. It will create a new and large class of corrupt voters.

Our readers experienced in elections are well aware that there are many voters who would gladly take a bribe, but dare not do so for fear of discovery. They have been partisans their lives through; they are connected with some church or chapel; they have always worn one colour, or called themselves by one name; and they know well that, if they were to vote against the party they had been associated with, all the town would be assured, as if it had been done before the eyes of all, that they had been bought. But these men, and they are many, would gladly put money into their purses if they knew that they could do so without discovery, and this the Ballot will enable them to effect without possibility of danger.

But it is said the penalties for bribery will continue as before; why should they be less effective to deter or to punish?

For this reason—that the means of detection are immensely diminished. Bribery is usually discovered now by this; that certain persons

who had promised one party, or who were usually attached to one party, are seen to vote for the other party. It is then well known what was the inducement, and every detective engine is set in motion to obtain proof of the fact. But where the vote is not known, this is impossible; the clue to the act of bribery is lost, and in practice there is perfect impunity.

This, too, is confirmed by the experiences of the Ballot in all countries. If bribery is to be employed, the Ballot makes it easy and safe, as, indeed, its advocates do not deny; they assert merely that no man will think it worth his while to spend money in purchasing votes which he cannot secure. The answer to this is given above, and as it is contended it will be here so is it actually found to be in the United States.

Thus we encourage increased bribery and extended personation, for what?—to prevent one elector in a hundred from being influenced to vote against his will. To protect one coward twenty honest men are demoralised. Surely this is paying dear for a trifling benefit.

We have already shown that the much desired object of the promoters of the Ballot—the exclusion of the profession from the conduct of elections—is impracticable. The considerations here suggested with respect to the encouragement and protection it will provide for bribery, fully support that view—*The Law Times*.

ARREST BY OFFICER WITHOUT WARRANT.

No part of the law is of such importance as that which bears upon the security of life, and hence the vital importance of all that relates to the legality of arrests by officers without warrant, for in the struggles which occur death too often ensues, and the recent case before Mr. Justice Hannen, at the Hertford Assizes, illustrates the importance of the subject. To resist an officer who is lawfully attempting to execute a legal warrant is, of course, unlawful; and if the officer is killed it is murder, while if death is inflicted by him necessarily in enforcing the arrest or resisting attack, it is justifiable homicide. If an officer attempts to arrest unlawfully, either without any warrant at all (in cases where one is required), or with one which is invalid, the attempt is unlawful, and the same principle applies—that if he kills the person arrested, he is guilty of murder; while if the person arrested necessarily kills him in resistance and defence of his personal liberty, then, in like manner, it is justifiable: (*Simpson's case*, 4 Inst. 388; *Cro. Car.* 587.) It may be laid down as a broad principle that in no case will the law justify homicide unnecessarily inflicted. But, on the other hand, where the law justifies the use of force, it justifies the homicide necessarily and naturally resulting from that lawful use of force.

In the recent case the question arose thus:

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The prisoner was indicted for the murder of a police officer. There was a warrant against the prisoner for misdemeanor, and the officer had been instructed to execute it. This of course must be taken to have meant that he was lawfully to execute it, and according to a case decided some years ago (*Galliard v. Laxton*, 81 L. J. 193, M. C.), it could not be executed by an officer who had it not with him at the time, in order to show it to the man and satisfy him as to the right to arrest him. The officer, though he knew of the warrant, had not got it with him at the time he met the prisoner, and, therefore, it is to be presumed, did not attempt to arrest him on it—for that which is unlawful is never to be presumed—and there was no proof that he did attempt to execute the warrant, though the case for the prisoner was based on the assumption that he did. It did not appear that he knew the man, and called upon him to surrender, or attempted to arrest him. All that was proved was, that he was seen to lay his hands on the pocket of the man, in which was a gun, and that is quite consistent with the idea that he acted under Poaching Prevention Act (25 & 26 Vict. c. 114), which gives a power of seizure under circumstances of suspicion; circumstances which existed in this case, as the man had just fired a gun off. However, the case for the prosecution was that the officer attempted an arrest under the warrant. There was a protracted struggle, in the course of which the man struck two blows with his gun, which proved fatal. The prisoner's counsel, at the close of the case, submitted that an attempt to execute the warrant was illegal, as the officer had it not with him, and the learned Judge so held. Then it was proposed to rest the case for murder on the power in the Poaching Act, but the learned Judge most justly held that the case for the prosecution could not now be re-opened and put upon an entirely new ground; but that it must stand as it did. Thus the case for murder failed, for, of course, as the case stood, the attempt to arrest being illegal, the man had a right to resist it, and thus the offence could not be murder. The learned Judge, however, still thought that it was manslaughter, and so no doubt it would be according to the decisions if the homicide were not necessary to the resistance. But the learned Judge left no question for the jury on that point, and treated it as a matter of law. And undoubtedly there are authorities, at all events *dicta* of eminent judges—one of which he quoted—which might appear to support his view; but on the other hand, there are authorities perhaps stronger still the other way, and they require to be carefully considered. The earliest case on the subject—that of the Pursuivant of the High Commission Court, in the reign of James I.—is very strong. There the officer was known to have a warrant, and showed it; but the person against whom it was directed drew his sword

and killed the officer. And all the judges held that as the warrant was illegal, the act was self-defence, and the verdict was "not guilty." (*Simpson's case*, 4 Inst. 888.) In another case, in the reign of Charles I., where the officer had a valid warrant, but attempted to execute it unlawfully, by breaking into a house, and the owner, against whom the warrant was executed, slew the officer; it was held manslaughter only, because he knew the officer, and that he had the warrant, but it was said that if he had not known his business it would have been justifiable: (Cro. Car. cited 1 Hale P. O. 458.) Now in the present case there was no evidence that the prisoner knew that there was a warrant against him, or that the officer had any authority to arrest him. And it appears that there were two struggles, and that the prisoner used no deadly weapon, but struck two blows with the butt end of his gun, flying as soon as he could, leaving the officer alive and able to walk, and (as was admitted) having no idea that he had inflicted a mortal wound. On the whole, it is impossible not to see that according to the old law he would have been held justified.

There are, however, more modern authorities or *dicta* which require to be noticed, and to one of which—though not to the latest—the learned Judge referred. In one or two cases it has been said that it may have been so under the circumstances. In the case referred to by the learned Judge, where the man unlawfully arrested, without any attempt to resist by other means, stabbed the officer. Baron Parke said that it was manslaughter, and that if he had prepared the knife for the purpose it would have been murder: (*Reg. v. Patience*, 7 Car. & P.) But it is not easy to reconcile this with the older authorities, unless upon the ground suggested, that the use of the knife was not necessary for the purpose of resistance. It is to be observed, moreover, that in that case the officer did not die—the indictment was for cutting and wounding, and the very essence of the offence was the use of the knife, which, man against man, could hardly be necessary in the first instance.

There was, however, a very recent case, to which the learned Judge did not refer, and which appears to have put the question on a very sensible footing. In that case the Judge ruled that if the violence used to resist the unlawful arrest was no greater than was necessary for the purpose, it was justifiable; otherwise it was manslaughter (*Reg. v. Lockley*, 4 F. & F.). According to that ruling it ought to have been left to the jury whether the violence was greater than necessary to resist the arrest, and they ought to have been told that the man was entitled to resist the arrest by any means necessary for that purpose, and even to the extent of inflicting death, if the arrest could not otherwise be avoided. Whether in the case of a protracted struggle the infliction of two blows with the butt end

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of a gun was a wanton excess of violence, would have been for the jury to determine; but it is to be observed that a man engaged in such a struggle cannot measure very nicely the force of a blow, and it was admitted by the prosecution that the man did not think he had killed the officer. It appeared also that he ran away, as soon as he could. The question is whether, under these circumstances, it was a conclusion of law that the effect of striking those blows was manslaughter.

No doubt the sufficiency of provocation is a question for the Judge. And the learned Judge treated it as a question of provocation. But was it not according to the authorities a question of justification? If so, then unless there was wilful excess the man was entitled to an acquittal. As it was, he had a sentence of fifteen years' penal servitude for a homicide in self-defence, just the same sentence which the learned Judge inflicted at Maidstone in a case of deliberate homicide out of revenge. Both cases were treated as cases of mere provocation, and the distinction as to the use of a deadly weapon with intent to kill was apparently overlooked. In the poacher's case, however, according to the authorities, there was a question of justification arising out of self-defence against illegal violence. If so, it is manifest that there is an inconsistency in the judicial dicta on this most important subject.—*The Law Times*.

CANADA REPORTS.

ONTARIO.

PRACTICE COURT.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law.)

COUNTY OF FRONTENAC V. CITY OF KINGSTON.

Judgment Roll—Form of—Where issues of law and fact, and declaration held bad.

Where defendant obtains judgment in demurrer because of the insufficiency of plaintiff's declaration, although there are also issues in fact and demurrers to pleas, the judgment roll should contain only the declaration, demurrer and judgment, omitting all intermediate proceedings.

[Prac. Court, Mich. Term, 1870.—Hil. Term, 1871.]

During Michaelmas Term, 1870, *Harrison*, Q. C. obtained a rule to set aside the judgment and judgment roll in this cause, on the ground that the roll was not a transcript of the pleadings, omitting the first, third, fifth and sixth pleas of the defendants and the issues in fact joined thereon: that those issues were never tried, and were still subsisting, nor were they struck out or disposed of, or in and by the judgment decided or determined; and that until the same were decided, defendants had no right to enter judgment on the said pleas; and also that as judgment was given against the plaintiffs on demurrer for insufficiency of their declaration, no judgment was given in favour of defendants on the demurrers to their pleas, the rule for judgment in no manner authorising judgment to be entered for defendants for sufficiency of their pleas; and that judgment for defendants

should have been entered simply for insufficiency of declaration.

During the same Term, *D. B. Read*, Q. C., obtained a cross-rule to amend the judgment roll by inserting therein a full transcript of the pleadings, and a suggestion that the plaintiffs' declaration being held insufficient in law, it became unnecessary to try any of the issues in fact, and that the same ought not to be tried, and that defendant do go thereof without day, &c., or to that effect, or why the issues of fact in the record should not be expunged.

Both rules were argued at the same time.

Harrison, Q. C., for plaintiff.

Read, Q. C., for defendant.

MONROSE, J.—It appears from the affidavits and papers filed, that the defendants demurred to the plaintiffs' declaration, and also pleaded several pleas. The plaintiffs took issue on all the pleas, and also demurred to the second, fourth and seventh pleas. Judgment was given for the defendants on the demurrer to the declaration, and a rule for judgment for defendants on demurrer was taken out and judgment entered. The judgment roll only contained the declaration, demurrers thereto and joinder, the pleas demurred to (omitting the first, third, fifth and sixth pleas,) the replication, taking issue on all the pleas, and the demurrers to the second, fourth and seventh pleas, and the joinder in demurrer. The roll ended thus: "It appears to the court here that the said declaration is, and the several counts therein are bad in substance," and these words were interlined, "and also that the second, fourth and seventh pleas are good in substance. Therefore it is considered that the plaintiffs take nothing, &c.;" and then follows award of costs of defence.

Now, it is clear that the judgment roll should be a transcript of all the pleadings; and although the books of practice and forms do not give any practical directions as to the way of making up the roll and entering judgment, in a case like this, when the court have determined that the plaintiff's declaration shows no cause of action, at the same time expressing their opinion that if the plaintiff had shown a cause of action, certain of defendants' pleas demurred to were good pleas. Yet it appears to me that, as the rule and practice is that the judgment shall be against the party who makes the first default, that where the plaintiff fails, as here, in his declaration, and judgment is against him, the same being final, no matter what may be the state of the subsequent pleadings, the final entry on the roll should be judgment for the defendant, on account of the declarations being bad in substance, taking no notice of the subsequent pleadings demurred to.

Then as to the issues in fact, as they appear on the roll, it seems to me that the mode of entry adopted in the case of *Robins v. Crutchley*, 2 Wils. 118, is the proper and most-convenient way of disposing of them. In that case the roll, after stating that plaintiff's replication was insufficient, proceeded: "Therefore, no respect being had to the issues aforesaid above joined between the parties to be tried by the country; it is considered that the plaintiff take nothing by her said writ, &c." I therefore think that the entry on the roll, as to the second, fourth and

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seventh pleas of the defendants being good in substance, ought not to have been so stated, as the defendants had final judgment on account of the plaintiffs' declaration being bad in substance, and that it should be struck out. This, I understand, was the main ground of complaint on the part of Mr. Harrison. If the defendants desire it, their rule to amend the roll shall be absolute, the defendants paying to the plaintiffs 25s. costs; such amendment to be made within two weeks. If the amendment be not made within that time, the plaintiffs' rule to be made absolute for setting aside the judgment with costs.

GRANT V. PALMER ET AL.

Record—What it should contain—C. L. P. Act, sec. 77.

Issues in law having arisen on the same pleadings with issues in fact, the former, which had been already argued but not determined, were omitted from the *nisi prius* record.

Held, an irregularity in omitting these issues on which contingent damages might have been assessed; and plaintiff was ordered, after verdict, to amend the record by inserting them.

The question, how far the *nisi prius* record should be a full transcript of the pleadings, discussed.

[Practice Court, Hilary Term, 1871.]

This was an action brought on a promissory note made by the defendant Winstanley, and endorsed by the defendant Palmer. The latter pleaded three pleas, on all of which the plaintiff joined issue, and demurred to the first and third. The defendant Winstanley, pleaded one plea, on which the plaintiff joined issue.

During this Term a rule was obtained calling on the plaintiff to shew cause why the record or paper writing purporting to be a record of *nisi prius* in this cause and the verdict rendered in favour of the plaintiff herein should not be set aside, either wholly or as against the defendant Palmer for irregularity, with costs, on the grounds that such record or paper writing, purporting to be a record of *nisi prius*, is irregular and defective as such, in that it is not a complete transcript or copy of all the pleadings in this cause, but wholly omits therefrom the demurrer of the plaintiff to the first and third pleas of the defendant Palmer herein, and the joinder in demurrer thereto; and also that such record contains no entry of any intended assessment of damages, contingent or otherwise, with reference to such demurrer, or why the verdict should not be set aside on the merits, and on other grounds disclosed in the affidavits and papers filed.

Harrison, Q. C., shewed cause.

The question of irregularity only can be raised in this court.

The demurrers were argued before the trial, and stood for judgment, and judgment has been given on them since the trial.

The jury had nothing to do with the issues in law, because the demurrers were to pleas on which issues in fact were also joined, and all the issues in fact were on the record: *Harrington v. Fall*, 15 U. C. C. P. 541; *Campbell v. Kemp*, 16 U. C. C. P. 244.

The record should be a copy of the issue book: *Doe v. Cotterell*, 1 Chit. Rep. 277; *Shepley v. Marsh*, 2 Str. 1181; and must be passed by the proper officer: *Reeves v. Eppes*, 16 U. C. C. P. 137.

The issue book must also be made up: *Jones v. Tatham*, 8 Taunt. 684.

He referred also to *Skelsey v. Manning*, 8 U. C. L. J. 166; *Patterson v. McCallum*, 2 U. C. L. J., N. S. 70; *Wood v. Peyton*, 2 D. & L. 441; *Har. C. L. P. Act*, (2nd ed.) 543, note (x). 287, note (v); *Welsh et al. v. O'Brien et al.*, 29 U. C. Q. B. 474.

M. O. Cameron, Q. C., supported the rule. The question is, are the demurrers a necessary part of the record? If they are, they should have been on the record.

The Common Law Procedure Act, section 77, enacts, that every declaration or other pleading shall be entered on the record made up for trial.

Section 293 provides for passing the record by the clerks of the crown or his deputy, and that it shall be signed by him.

The issue book is required to be made up only by rule of court.

The judgment roll is made up from the *nisi prius* record. The latter therefore should contain a full transcript of the pleadings. The practice is clear on that point: *Arch. Pr.*, 12th ed., 929; *Impey's Pr. K. B.*, 6th ed. 358; *Ferguson v. Mahon*, 2 Jur. 820.

Wilson, J.—In 2 Lush's Pr. 537-538, it is said if the record be right proceedings will not be set aside because the issue book is wrong: *Bagley's New Pr.* 165; *Tidd's New Pr.* 476; *Codrington v. Lloyd*, 8 A. & E. 449.

The defendant, it is admitted, is estopped from complaining of the defective issue book, but still the record has to be made up, passed and signed by the officer of the court.

The officer knows nothing of the issue book, he must make up or pass the record from and by the original pleadings on his file, which he has not done. The issue book is only a collateral proceeding.

The case in 15 U. C. C. P. 541, applies only to actions of ejectment, which are regulated by a practice under the special statute applicable to them.

It is said that a plea in abatement, on which judgment of *respondens ouster* is given, is not entered on the roll: *Pepper v. Whalley*, 4 A. & E. 90; *Dubartins v. Chancellor*, 1 Ld. Ray. 329; 5 Mod. 399, and 12 Mod. 190.

In 1 Sellon's Pr. 425-429, it is said that all the pleadings in the cause must be regularly entered *verbatim* on the *nisi prius* record, and if there are proceedings on demurrer they must be set forth.

By Tidd's Pr. 9th ed. 775, the *nisi prius* record contains an entry of the pleadings, &c., as in the issue or paper book; and (p. 722) the issue book must contain all the issues in fact and in law.

By the present English practice it is a copy of the issue as delivered in the action which must contain the whole of the proceedings.

By section 203 of the Common Law Procedure Act the *nisi prius* record is to be passed and signed by the officer of the court in whose office the same is passed. The *nisi prius* record is referred to as a well known proceeding, and it is not said what it shall contain.

In *Pepper v. Whalley*, 4 A. & E. 90, the court

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refused to set aside a verdict because the *nisi prius* record did not contain an entry of the plea in abatement on which a judgment of *respondet oster* had been given, because such proceedings were by the subsequent pleadings wholly immaterial.

In *Wadsworth v. Brown*, 3 Dowl. 698, the court made absolute a rule for a replender, or for the plaintiff to amend, setting aside the verdict, when the plaintiff to a plea concluding with a verification, had not taken issue, but had only added a similiter.

In *Codrington v. Lloyd*, 8 A. & E. 449, there were issues of law and in fact. The plaintiff had got judgment on the issues in law. He then delivered the issue and notice of trial. The award of jury process in the issue was that the jury were to try the issues in fact, and not to assess the damages on the demurrer. It was contended that as the issues in fact went to the whole cause of action, the jury would of course assess damages on the whole cause of action, and so a direction to them to assess the damages on the demurrer was unnecessary. Lord Denman, C. J., apparently assented to that argument, if there had been no judgment on the demurrer, and if the damages had to be assessed contingently, for he says (p. 466). "This argument is quite just in the event of the jury finding for the plaintiff; but if they should find for the defendant it is still possible that the plea may be held bad, and that the court may give judgment for the plaintiff notwithstanding the verdict; if they should do so, and also give judgment for the plaintiff on the demurrer, he will be entitled to damages, and a second jury must be summoned to assess them. . . . And as there is a possible state of circumstances which may lead to the necessity of summoning a second jury, if that form be not adopted (*i. e.* to award a *venire tam quam*), this issue is incorrect in not adopting it."

In the case referred to there could have been no assessment of contingent damages, even if judgment had not been given on demurrer, if the plaintiff failed on the issues in fact.

That case is then an authority that a general venire to try the issues in fact will be sufficient, although there are issues in law on the record, if judgment has not been given on them, and if the issues in fact go to the whole cause of action. It is very strongly an authority by implication also, that the issues in law must be actually entered on the record, so that damages may be assessed on them, contingently or otherwise, according to the fact. In *Ferguson v. Mahon*, 2 Jur. 820, a notice of trial was set aside because the issue book had been made up and served, omitting the issue in law. The court will not, when damages have not been assessed at the trial, award a writ of enquiry—it must be a *venire de novo*; *Clements v. Lewis*, 3 B. & B. 297.

It is the duty of the attorney in the cause to make up the record, and it is quite clear that the issues in law as well as in fact should have been entered, and that the officer of the court should not have passed and signed the record in its present form.

In this case the cause of action is founded on a promissory note made by Palmer, payable to

his co-defendant Winstanley. Winstanley pleaded payment. Palmer pleaded three special pleas on which the plaintiff joined issue, and the plaintiff demurred to the first and the third pleas of Palmer. The plaintiff succeeded on all the issues in fact, so that the issues in law are of no moment, excepting as to costs, and since the trial the court has given judgment for Palmer on the demurrer to his first plea, and for plaintiff on his demurrer to Palmer's third pleas.

If judgment had been given before the trial for the plaintiff, on the demurrer, he should have entered it to have an assessment of damages, for, as in *Codrington v. Lloyd*, 8 A. & E. 449, the plaintiff might have failed in the issues in fact, and then he would be obliged of necessity to assess his damages on the issues in law. That would have been an argument against allowing the cause to go to trial, under such circumstances as in the case just referred to. But is it any argument after the trial has taken place, and the plaintiff has succeeded on the issues in fact and assessed thereon all the damages he can ever get? I am not satisfied that it is. As judgment was not given on the issues in law at the trial, the case stood thus. If the plaintiff succeeded on the issues in fact, he would get his damages assessed thereon, and as much as he could ever get even if his issues in law had been there as well. But the defendant might have succeeded on one or two of the issues in fact, and the plaintiff on the third issue, or the defendant might have succeeded on all three of his issues in fact, and the plaintiff on the issue of fact joined with Winstanley; in any of which cases the plaintiff should have been in a position to have assessed his contingent damages, so that if he got judgment afterwards on the demurrer, there would have been no necessity for any new assessment of damages to be made. It so happens that the result of the trial has not made a *venire de novo* necessary. But as a matter of practice is it expedient that causes should be so dealt with that they should be taken down to trial in this imperfect and improper manner? I do not think it is.

If this were an application before trial to set aside the notice of trial and the service of the issue book, I should certainly, on the express authorities before referred to in 8 A. & E. 449, and 2 Jur. 820, be obliged to do so, for the mischief apprehended might happen. Here, however, the trial is over and no mischief has happened. No new assessment of damages is required.

I am desirous to sustain the proceedings if I can; yet I am afraid of introducing a confusion and laxity of practice that may be very embarrassing.

The amendment too might have been made at the trial. Nothing has been said of waiver by not being objected to at the trial. Perhaps it might have been useless, as the cause was tried in the County Court. I think it can only be properly cured by amending the record now, if it is an amendment which I ought to make. It is true, as Williams, J., said, in *Ferguson v. Mahon*, 2 Jur. 820, "Throwing a demurrer at the jury does not appear to be of much use, however ancient the practice may be." But there is

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nevertheless an order, regularity and certainty that must be observed, for the very purpose of facilitating and expediting business.

On the whole, though with some doubt and hesitation, I think I should now amend this record by making it as it should have been, as the same assessment that was made will enure to the benefit of the plaintiff on the issues of law that have since been disposed of in his favour.

This defective record, which was and must have been passed and signed by the deputy clerk of the Crown, may be considered to have been the act of the officer of the court, just as the writ in *Reg. v. Conyers*, 8 Q B. 981, was deemed to have been drawn by the officer of the court, and the defect to have been by his misfeasance, though he only sealed it, and it was drawn and settled in fact by a special pleader, whose mistake it really was. The plaintiff must however pay the costs of this application.

The rule will therefore be discharged on condition of the plaintiff amending the *nisi prius* record *nunc pro tunc* within two weeks, and upon paying to the defendant, Palmer, the costs of this application, or upon amending within two weeks after Palmer shall have filed his co-defendant's consent to the amendment being made; and, if Palmer shall not so file such consent within two weeks from this time, this rule will be discharged without costs, as Winstanley should properly have been called on by the rule to shew cause as well as the plaintiff.

Rule discharged as above.

MUNICIPAL CASE.

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Municipal Election—Right of candidate to resign—C. S. U. C. c. 54, sec. 97, sub-sec. 6—Municipal Act of 1866, sec. 110, sub-sec 6, and sec. 113.

A candidate for the office of reeve, who is proposed and seconded at the nomination meeting, may, with the consent of his proposer and seconder and of the electors present, withdraw from his candidature.

A voter, who nominated another for a municipal office, having at the meeting permitted his candidate to retire from the contest, without expressing at the time any objection to his withdrawal, cannot afterwards insist upon having the name of his nominee published in the list of candidates, or entered as such upon the poll book.

[Chambers, Feb. 10, 1871.—*Mr. Dalton.*]

The statement of the relator complained that Kenneth Chisholm had not been duly elected, and usurped the office of reeve of the village of Brampton, under the pretence of an election held on the 2nd January, 1871.

The grounds stated were: that at the nomination the said Kenneth Chisholm, Jacob P. Clark, James Fleming, John Haggart, and the relator, were duly proposed and seconded as candidates for the said office of reeve, and that no other candidates were proposed within one hour after the meeting of the electors for the said nomination: that the said John Haggart was proposed for the said office by the said Kenneth Chisholm, and seconded by the said relator; that no one of the said persons so nominated retired or withdrew from the said nomination within one hour

from the time the said meeting was held and the said nominations were made: that no poll was demanded for the said office of reeve, but a poll was granted and allowed by the said returning officer: that a show of hands was called for on behalf of John Haggart, and a large majority of the electors present appeared to be in his favor: that the said John Haggart then said (but after a considerable number of the electors who had been present had left the meeting) that he would retire from and not contest the said election: that the relator, who was his seconder on his said nomination, never consented to the retirement of the said John Haggart, and on the day following the said nomination informed the said returning officer that he must put up the name of John Haggart as one of the persons proposed as reeve, as he, the relator, insisted that Haggart should be voted for at the election: that John Haggart himself notified the said returning officer, two days before the election, that he was a candidate for the said office, and requested the returning officer to enter his name on the poll-book as a candidate: that the returning officer did not put up in the office of the clerk of the said village, or anywhere else, the name of John Haggart as one of the persons proposed as reeve, but refused so to do, and his name was not at any time so posted up: that on January 2nd, the day of the said polling, John Haggart presented himself as a candidate to the returning officer: that the returning officer would not place the name of the said John Haggart in his poll-book as a candidate for reeve, and would not record any votes for him, although many (some eighty-two) were tendered for him; and that if the returning officer had received votes for John Haggart, he would have been elected reeve of the said village, instead of Kenneth Chisholm, who was declared duly elected.

The returning officer, in his affidavit, swore as follows:

1. "That I was chairman of the meeting of electors held in the village of Brampton, on the 19th December last, for the nomination of candidates for the office of reeve, and I took the chair thereat at noon of the said day; and in the course of an hour thereafter, five candidates, being the same as are mentioned in the statement of the relator herein were duly nominated for said office; and after such nominations they all addressed the electors present at the meeting; and John Coyne, the said relator, and James Fleming, and John Haggart, at the close of their respective addresses, declared that they were not candidates for the said office, and withdrew from the contest therefor; and as each of them did so, I struck his name off the list of candidates for said office; and no person present at said meeting made any objection to the withdrawal of the said candidates; and although the relator was present at said meeting, and knew of the withdrawal of said Haggart and the said other candidates, he did not object thereto; and I believe the said relator and the said John Haggart also believed at the time that all the said withdrawals were complete abandonments of their candidatures: by said parties.

2. "After the said relator and the said John Haggart and James Fleming had withdrawn as afore-said, I read out the names of the defendant

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and Jacob Paul Clark as the candidates for the said office (the relator being present and making no objection), and I adjourned the meeting to 2nd day of January, stating at the time that the candidates for the said office who remained on the list after the said withdrawals, were the defendant and said Clark.

3. "That there was no show of hands called for said candidates; but the said John Haggart, in his address to the electors, stated that if he was to be opposed, he would not contest the election; and in order to see what opposition he would be subjected to, he called on those who were in his favor as against Mr. Clark (who was thought to be the only person who would contest the election with him), to hold up their hands; but only a small proportion of the electors did so, and the majority of those who did, were in favor of said Haggart; and he then asked Clark if he intended to contest the election with him, and Clark said he did; whereupon the said John Haggart announced that he withdrew from the contest, and desired me to strike his name from the list of candidates, and I did so.

4. "All the proceedings aforesaid took place at said meeting, and were part of the proceedings thereof, before I announced that the only candidates standing were the defendant and said Clark; and no one made any objection to said proceedings or to any of the said withdrawals; and the relator was present during the whole time."

B. A. Harrison, Q. C., and J. K. Kerr, showed cause.

1. Though at first a candidate, yet, under the authorities and the circumstances of this case, Haggart was not, at the close of the nomination, a candidate.

2. The relator acquiesced in the withdrawal, and cannot now be heard: *Reg. ex rel. Rosebush v. Parker*, 2 U. C. C. P. 15; *In re Kelly v. Macarow*, 14 U. C. C. P. 457; *Reg. ex rel. Bugg v. Bell*, 4 Prac. Rep. 226.

3. Where there is no probability shown that a new election would make a change in the person elected, mere irregularity is no ground for setting aside the election. See *Morris v. Burdett*, 2 M. & S. 212; *Reg. ex rel. Charles v. Lewis*, 2 Ch. R. 171; *Reg. ex rel. Walker v. Mitchell*, 4 Prac. Rep. 218.

J. H. Cameron, Q. C., and Dr. McMichael, supported the summons, citing The Queen v. Mayor of Leeds, 11 A. & E. 512; *Reg. v. Bower*, 1 B. & C. 585; *Reg. v. England*, 2 Leach, C. C. 767; *Reg. v. Woodrow*, 2 T. R. 731; *The King v. Burder*, 4 T. R. 778; Comyn's Digest, Title Indictment, D.; Municipal Act of 1868, sec. 186; Har. Mun. Man. p. 91; *Reg. v. Mooney*, 20 L. T. Q. B. 265; *The Queen v. Preece*, 5 Q. B. 94.

Mr. DALTON.—Upon the objection, which has been urged, to the defendant's election as reeve of Brampton, I will read the affidavit of Mr. McCulla, the returning officer, as containing a statement of the facts upon which I act. Mr. McCulla is in an official position, independent of both parties, and gives a very clear statement of what occurred, which I have no doubt is quite correct. Indeed I do not know that there is any dispute at all as to what took place at the nomination. He says: [Mr. Dalton here read the extract from the affidavit of the returning officer, which is given above.]

It seems to me to be very clear, whatever may be the derivation of the word, that a "candidate," in the sense of the statute, is one put forward for election, no matter whether with or against his own will; from which it would seem to follow that he cannot, without the assent of others, resign. His assent is not necessary to his candidature, but he must have a proposer and seconder. He need not be present at the meeting, and his dissent from the proceeding is unavailing.

But the question is, can a candidate, once nominated, be withdrawn? It is difficult to comprehend why this cannot be done before the close of the meeting, with the assent of all concerned; for every one then acts of his own free will, with a full knowledge of the facts. Contracts can be dissolved by the will of those who made them. There are exceptions, but it is generally true; and it is the general rule that the legal effect of all action may be annulled or reversed by the common agreement of all who are concerned. Why then, before being acted on, cannot a nomination be withdrawn, as here, by the candidate himself, his proposer and seconder, and the electors present? It is true that the clause of the Act does not speak of any power of resignation or withdrawal, but directs that the poll-book shall contain the names of the candidates "proposed and seconded," which no doubt means the names of all candidates proposed and seconded. But the answer to this seems to be, that when the nomination is withdrawn at the meeting by the agreement of every one affected by the nomination or withdrawal, it is as though that candidate had never been proposed and seconded at all; for he does not continue to be to the close of the meeting, and is not then, a "person proposed" for the office. That this is the construction put upon the statute in practice, is very clear; for nothing is more common than for a number of candidates to be proposed, where there is no intention on the part of any one that they should contest the election; and upon their withdrawal, it has never, that I know of, been suggested until now, that it may be demanded, after the meeting, that their names shall be entered in the poll-books.

From the nature of the proceeding, the electors and the returning officer are entitled to know, at the close of the meeting, who are the candidates; for in case there is but one candidate, the returning officer is to declare him elected; and in case there are more candidates than one, the returning officer, on the day following the nomination, is to post up the names of the candidates. So that I do not understand how Mr. Haggart's or Mr. Coyne's communications with the returning officer after the nomination day can affect this proceeding. But suppose the first case had happened, and Mr. Chisholm had been the only candidate remaining; then the returning officer, with the assent of all the other candidates, their proposers and seconders, and of the electors present at the meeting, would on the spot have returned Mr. Chisholm as reeve. If it is asserted that an election so conducted would be void, I must say that only judicial decision could make me assent to it. I have been speaking of the statute as though the relator here were an elector, not present at the meeting, who had afterwards voted at the election for Mr.

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Haggart. His position would in my opinion, be very different from that of Mr. Coyne; for if I am wrong in supposing that the proceedings at the election were legal, there are still reasons which apply *ad hominem* to prevent Mr. Coyne from setting up the objection. It was urged, upon the argument, that this proceeding was so much in the interest of the electors, that the truth of the facts must alone be regarded, and that the conduct of the relator or of Mr. Haggart could not here be set up to exculpate the truth. But the cases cited by Mr. Harrison and Mr. Kerr are quite clear on the point that the conduct of the relator may waive objections otherwise good, or may estop him from alleging them. Indeed he is regarded as any other plaintiff, claiming in his private right.

Now, Mr. Coyne was present throughout the whole proceedings at the meeting. He must have heard the withdrawal of all the candidates but Mr. Clark and Mr. Chisholm; he must have heard the returning officer announce that they were the only candidates remaining; and yet he allowed the meeting to close—all present supposing such to be the fact—without expressing objection or dissent. I think he must be bound by the rule in *Pickard v. Sears*, 6 A & E 649, and the kindred cases. Surely this is estoppel by conduct. It is very easy to suppose cases where such a course would completely throw the electors—especially those opposed to Mr. Haggart—off their guard, if they were to find, the next morning, that Mr. Haggart was still in the field. I think the course taken in this election was legal; and that if otherwise, neither Mr. Haggart nor Mr. Coyne can be heard to urge this objection. I think there should be judgment for the defendant with costs.

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BROOK v. HOOK.

Ratification—Forged instrument; adoption of.

A forged instrument cannot be ratified by the person whose name is forged, and he cannot adopt it so as to make himself liable thereon.

J. owned the plaintiff £20, and sent to him a promissory note for that amount, which purported to bear, and was believed by the plaintiff to bear, the signatures of J. and the defendant, who was J.'s brother-in-law.

Before the note became due the plaintiff met the defendant and mentioned the note to him. He denied the signature to be his, and the plaintiff thereupon said that it must be a forgery of J.'s, and he would consult a lawyer with the view of taking criminal proceedings against him. The defendant begged the plaintiff not to do so, and said he would rather pay the money than that the plaintiff should do so. The plaintiff then said that he must have it in writing; and that, if the defendant would sign a memorandum, he would take it. The defendant thereupon signed a document admitting himself to be responsible to the plaintiff for the amount of the note.

Held (by KELLY, C.B., CHANNELL and PIGOTT, BB.), first, that the foregoing document was no ratification of the forged promissory note, but an agreement on the part of the defendant to treat the note as his own and to become liable upon it, in consideration that the plaintiff would forbear to prosecute J., and that this agreement was against public policy and void, as founded upon an illegal consideration; and, secondly, that the foregoing document was no ratification, inasmuch as the act done—that is, the forged signature to the note—

was illegal and void, and that, although a voidable act might be ratified by matter subsequent, it was otherwise when an act was originally and in its inception void.

Held (by MARTIN, B.) that the above document was a good and valid ratification of the forged note, and that the defendant was liable to pay to the plaintiff the amount thereof.

[19 W. R. 508.]

This was an action upon a promissory note for £20. The defence was that the defendant's signature was a forgery. A verdict having been entered for the plaintiff, a rule nisi was obtained for a new trial. The facts of the case are fully stated in the judgments delivered by Kelly, C.B., and Martin B.

Kingdon, Q. C., A. J. H. Collins, and R. D. Bennett showed cause.—The plaintiff is entitled to the verdict. [PIGOTT, B.—Can a forgery be ratified?] The forged signature was an act done for the defendant within the principle laid down in *Tindal, C. J., in Wilson v. Tumman*, 6 M. & G. 242. [KELLY, C. B.—This was not an act done on the defendant's behalf.] In *Byles on Bills*, p. 200 (10th ed.), it is said:—"If the drawee has once admitted that the acceptance is in his own handwriting, and thereby give currency to the bill, he cannot afterwards exonerate himself by showing that it was forged." *Leach v. Buchanan*, 4 Esp. 226. [KELLY C. B.—How was the plaintiff's position altered?] The principle of *Reg. v. Woodward*, 31 L. J. M. C. 91, 10 W. R. 298, applies to this case; it shows that there may be a ratification of a felonious act [KELLY, C. B.—In that case the ratification itself was a felony.] It seems to be admitted in *Wilson v. Barker*, 4 B. & Ad. 614, that in some cases a person by ratification may become a trespasser; *Bird v. Brown*, 4 Exch. 786. It is clear from 2nd Greenleaf on Evidence par. 66, p. 60, that slight evidence of ratification is sufficient. If the question what was the intention of the defendant at the time of signing the document of December 17 were left to the jury, they ought to be called upon to construe wills and deeds. In construing a document the Court may look at the surrounding circumstances: *Hesfield v. Meadows*, L. R. 4 C. P. 595.

Lopes, Q. C. and Poo's, in support of the rule.—There can be no ratification of the forged signature, because the defendant and Jones did not stand in the relation of principal and agent: *Story on Agency*, s. 251 a (7th ed.). The defendant relies on the maxim there cited—*Ratum quis habere non potest, quod ipsius nomine non est gestum*. The judgment of Holroyd J. in *Saunderson v. Griffiths*, 5 B. & C. 909, supports the defendant's contention. (They cited also *Routh v. Thompson*, 13 East. 274; *Lucra v. Crawford*, 1 Taunt. 325; *Hagedorn v. Oliverson*, 2 M. & S. 485. The plaintiff's position was not altered after the document of 17th December was signed by the defendant, and the rule in *Pickard v. Sears*, 6 A. & E. 469, does not apply. It is clear from *Story on Agency*, ss. 240 and 241, that a felonious act being void cannot be ratified. The case of *Wilkinson v. Stony*, 1 Jahb & Symes, 509, decided in the Court of Queen's Bench in Ireland, is conclusive in the present case, and shows that it was for the jury to say with what intention the document of December 17th was signed by the defendant. There is no

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estoppel upon the defendant: *Heane v. Rogers*, 9 B. & C. 577.

Cur. adv. vult.

Jan. 27.—The following judgments were delivered:—

MARTIN, B.—This was an action upon a promissory note, tried before me at the last Bristol Assizes. The note was dated 7th November, 1869, whereby the defendant and one Richard Jones jointly and severally three months after date purported to promise to pay the plaintiff or his order £20 for value received. The plea traversed the making of the note. The plaintiff was called as a witness, and stated that in July, 1868 Richard Jones applied to him for a loan of £50, and told him that the defendant Hook (who was his brother-in-law) would join him in a note as surety; that a note was given to him purporting to be signed by the defendant and Jones, which was renewed and partly paid off; and that upon the 7th November, 1869, there was £20 remaining due; that upon that day he received by post the note sued upon, and believed the signatures to be those of the defendant and Jones; that upon the 17th December, 1869, whilst the note was current, he saw the defendant and showed the note to him, and said that the note purported to be signed by him; that the defendant denied the signature to be his; that the plaintiff said that if so it must be a forgery of Jones', and that he would consult a lawyer with the view of taking criminal proceedings against him; that the defendant begged him not to do so, and said he would rather pay the money than that he should do so; that the plaintiff then said he must have it in writing, and that if the defendant would sign a memorandum to that effect he would take it, and that the defendant then signed a memorandum as follows:—"Memorandum that I hold myself responsible for a bill dated November 7th, 1869, for £20 bearing my signature and Richard Jones' in favour of Mr Brook. Richard Hook, December 17th, 1869." That when the defendant signed the document the plaintiff understood the defendant denied the signature to be his; that he only knew the defendant from what Jones had said of him, and that he had no idea the note was a forgery until he saw the defendant. This was the plaintiff's case, and the learned counsel for the defendant proposed to call the defendant to prove that the note was a forgery, and that his name was forged. I stated that, in my opinion, that was an immaterial circumstance, and that if the defendant signed the memorandum of the 17th December the plaintiff was entitled to the verdict upon the issue joined, and that it was for me, and not for the jury, to determine what was the construction of that document. Thereupon the verdict was entered for the plaintiff, and I stayed execution until the fourth day of the following term. A rule has been obtained for a new trial upon the following grounds:—First, that the verdict was against the evidence; and, secondly, for misdirection viz., that the judge directed the jury that the only question for them was, whether the memorandum of the 17th December was signed by the defendant. The statement as to my direction is substantially correct, and if I was wrong in holding that the signing and making by

the defendant of the memorandum of the 17th December entitled the plaintiff to the verdict upon the issue joined, the defendant is entitled to have the rule made absolute, and to have a new trial. In the argument I asked the learned counsel for the defendant what he deemed to be the proper direction to the jury, and he stated it ought to have been as follows:—"That, having regard to what took place, and the circumstances under which the memorandum was given, the jury ought to have been asked whether the defendant intended to ratify and confirm what had been done by Jones in forging his name, or whether he intended to guarantee the payment of the note." Now I am of opinion that I could not lawfully have submitted this question to the jury; in the first place, I am of opinion that when the defendant signed a memorandum professing to be an entire and complete writing evidencing a transaction, the true construction of that document and not his intention other than shown by the writing, is the true test; and, further, that it is a matter of law for the judge to construe the document and its construction was not matter to be submitted to the jury. A case was cited from an Irish report, *Wilkinson v. Stonry*, 1 Jebb & Syme, 509, showing that under the circumstances in that case there was a question for the jury. I have no doubt that the case was rightly decided; but there the writing was a letter, and there were other facts bearing upon the transaction; but the present was the case of a single writing made for the purpose of evidencing a transaction, and I entertain no doubt that such a writing is to be construed by the judge and not by the jury; if it were not so, there would be no certainty in the law; and, secondly, that there was no evidence that the document was a guarantee or intended to be a guarantee, but merely was intended to show that the defendant was responsible upon the note. I am therefore of opinion that I would have acted erroneously if I had submitted the above question to the jury. And I remain of opinion that under the circumstances of this case the only question for the jury was whether the memorandum of the 17th of December was the memorandum of the defendant, and that my ruling was right; that if it were, it was a ratification of the contract made in the name of the defendant, and binding upon him upon the legal principle that *omnis ratihabitio retrotrahitur et mandato equipatur*, Co Litt 207. I apprehend that the circumstance of Jones being a party to the note is immaterial, and that the question is the same as if the note were several and the defendant's name alone on it; and in my view of the case the facts may be taken to be that upon the morning of the 17th of December the defendant was not liable upon the note, because his signature was forged; that the plaintiff took and held the note believing that the signature was a genuine one, and that the contract to pay purported to be the contract of the defendant, and that the defendant, upon the statement that a lawyer would be consulted as to the criminal responsibility of Jones, signed the document of the 17th of December. In my opinion this was a ratification within the meaning of the above maxim, and rendered the defendant liable to

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pay the note. A ratification is the act of giving sanction and validity to something done by another. Jones purporting to utter an obligatory and binding security had given to the plaintiff the note bearing the defendant's name, and the defendant by the writing signed by him declared that he held himself responsible upon it, it bearing his signature, and if that was not giving sanction and validity to the act of Jones in delivering the note so signed to the plaintiff, I am at a loss to know what a sanction or ratification is; to say it is not seems to me a plain misconception of a written document or the denial of a self-evident proposition. Suppose nothing had been said as to criminal proceedings against Jones, and that the defendant upon being shown the note by the plaintiff had merely said:—"The writing is not mine; but I am responsible for it;" can any one doubt that the maxim would have applied, and that the defendant would have ratified the transaction? It is so stated by Burton, J., in the case of *Wilkinson v. Stoney*, before cited, and he was one of the most eminent of modern lawyers. Then does the circumstance that the plaintiff said that he would consult a lawyer in regard to criminal proceedings against Jones make any difference? I think not. A ratification of a contract is not a contract; it is an adoption of a contract previously made in the name of the ratifying party; the contract, if a simple contract, must have been made upon a valuable consideration; if it were not, the adoption or ratification of it would be of no avail. This is the true meaning of the sections cited by Mr. Lopes from Storey on Agency. If a contract be void upon the ground of its being of itself and in its own nature illegal and void, no ratification of it by the party in whose name it was made by another will render it a valid contract; but if a contract be void upon the ground that the party who made it in the name of another had no authority to make it, this is the very thing which the ratification cures, and to which the maxim applies *omnis ratihabitio retrotrahitur et mandato æquiparatur*. No words can be more expressive; the ratification is dragged back, as it were, and made equal or equipollent to a prior command. A ratification is not a contract and requires no consideration. It was so said by Burton, J., in the case before referred to. A contract that in consideration that the holder of a promissory note would not prosecute a man for the felony of forging a name to the note, the defendant would pay the note or guarantee the payment of it may be illegal and void; but there was no evidence of such a contract even in words in the present case, and if there were, there would be a legal principle to prevent its operation, for the written memorandum was made and signed for the purpose of evidencing the transaction, and there is not a word of contract in it either on behalf of the plaintiff or indeed of the defendant; it is what it was intended to be—a ratification or adoption by the defendant of the signature and contract made in his name, it may have been by a forgery or it may have been under circumstances which would not have justified a conviction for that offence. For the purpose of my judgment I assume it was a forgery, for which Jones might have been con-

victed. The case of *Wilson v. Tuman*, 6 M. & G. 286, was cited on both sides; it is a case of great authority, and is a considered judgment. It is there laid down "that an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him; in such case the principal is bound by the act, whether it be for his detriment or advantage, and whether it be found on a tort or contract, to the same extent and with all the same consequence which follow from the same act done by his previous authority." Several other cases were cited to the same effect, but there is no doubt about it. Tindal, C. J., lays it down as the known and well-established rule of law, and, as it seems to me, it is conclusive in favor of the plaintiff in the present case. But it was said that a forged signature cannot be ratified or condoned as regards the forger; but there is no authority whatever to distinguish the ratification of a parol contract and of a written one made by one person in the name of another without authority. Tindal's, C. J., expression is "made without any precedent authority whatever," which would clearly include a forged document. There is in Broom's Treatise on Legal Maxims, p. 887, a comment upon the maxim, and also in Story's, J., book, beginning at section 239, and in neither of these treatises is one word to be found drawing any distinction between the ratification of a written contract, which was in its inception a forgery, and one which was not of that character. The foundation of ratification of contracts is throughout deemed to be that the contract originally purported to be by and in the name of the person ratifying. But there is authority to the contrary. In the before-cited case of *Wilkinson v. Stoney*, Burton, J., clearly shows that he thought a forged acceptance of a bill could be ratified, and in *Ashpit v. Bryan*, 11 W. R. 297, 8 B. & S. 492, Crompton, J., stated that a cause had been tried before him, where a father was sued upon his acceptance forged by his son; the party who held the bill went to the father and said, "We shall proceed against your son; is this your acceptance?" and the father said, "It is;" and upon this evidence he thought the rule as to estoppel in *Freeman v. Cooke*, 2 Ex. 654, applied, and that the father was liable. He says that a bill of exceptions was tendered to his ruling by a very learned person, but after consideration it was abandoned. He goes on to say that he was not sure whether the party had knowledge that it was not the acceptance of the father, but he says that in his opinion that was immaterial, and that the person making the statement must be considered as saying, "The instrument may be treated as if accepted by me." This case seems to me to be identical with the present, and with me no higher authority exists than the judicial opinion of Mr. Justice Crompton. He put this case on the ground of estoppel. I think the doctrine of ratification the more applicable; but whether such a document as that of 17th of December operate by way of estoppel or by that of ratification, in my opinion it rendered the defendant liable. In my opinion my ruling at Nisi Prius was correct, and the rule ought to be discharged.

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KELLY, C. B.—This is an action on a promissory note payable three months after date, and purporting to bear the signatures of one Jones and the defendant. The declaration is on the note, and the defendant has pleaded that he did not make the note. Upon the trial it appeared that the signature of defendant to the note was not his own, and it was assumed by the learned judge who tried the cause and by counsel on both sides that it was a forgery; consequently, if the case had rested there, the defendant would have been entitled to the verdict. But it was proved that Jones having been indebted to the plaintiff upon a previous bill had partly paid it, leaving £20 still due; the note in question was handed by Jones to the plaintiff for that balance of £20. When the note was about to become due the plaintiff had an interview with the defendant, at which, upon the note being mentioned, the defendant at once declared that it was not his signature, and it was perfectly understood between them that it was, in truth, a forgery; whereupon the plaintiff said he should consult his solicitor with a view to proceed criminally against Jones; upon which the defendant said rather than that should be he would pay the money. Upon this the following paper was drawn up by the plaintiff, and signed by the defendant:—"Memorandum that I hold myself responsible for a bill, dated November 7, 1869, for £20, bearing my signature and Richard Jones's in favour of William Brook." Upon this evidence it has been contended, on behalf of the plaintiff that this paper was a ratification of the making of the note by the defendant, and upon the principle *omnis ratihabitio retrotrahitur et mandato priori æquiparatur* the jury were directed to find that the note was the note of the defendant, and that the plaintiff was entitled to the verdict. I am of opinion that this verdict cannot be sustained, and that the learned judge should have directed a verdict for the defendant, or at least have left a question to the jury as to the real meaning and effect of the memorandum and the conversation taken together; and this, first, upon the ground that this was no ratification at all, but an agreement upon the part of the defendant to treat the note as his own, and to become liable upon it, in consideration that the plaintiff would forbear to prosecute his brother-in-law, Jones; and that this agreement is against public policy and void, as founded upon an illegal consideration; secondly, the paper in question is no ratification, inasmuch as the act done, that is the signature to the note, is illegal and void; and that, although a voidable act may be ratified by matter subsequent, it is otherwise when an act is originally and in its inception void. Many cases were cited to show that where one sued upon a bill or note has declared or admitted that the signature is his own, and has thereby altered the condition of the holder, to whom the declaration or admission has been made, he is estopped from denying his signature upon an issue joined in an action upon the instrument. But here there was no such declaration and no such admission. On the contrary, the defendant distinctly declared and protested that his alleged signature was a forgery; and, although in the paper signed by the defendant he describes the bill as bearing

his own signature and Jones's, I am of opinion that the true effect of the paper, taken together with the previous conversation, is, that the defendant declares to the plaintiff: "If you will forbear to prosecute Jones for the forgery of my signature, I admit, and will be bound by the admission, that the signature is mine." This, therefore, was not a statement to the plaintiff that the signature was the defendant's, and which being believed by the plaintiff induced him to take the note, or in any way alter his condition; but on the contrary it amounted to the corrupt and illegal contract before mentioned, and worked no estoppel precluding the defendant from showing the truth, which was that the signature was a forgery, and the note was not his note. In all the cases cited for the plaintiff the act ratified was an act pretended to have been done for or under the authority of the party sought to be charged; and such would have been the case here if Jones had pretended to have had the authority of the defendant to put his name to the note, and that he had signed the note for the defendant accordingly, and had thus induced to the plaintiff take it. In that case although there had been no previous authority, it would have been competent to the defendant to ratify the act, and the maxim before mentioned would have applied. But here Jones had forged the name of the defendant to the note, and pretended that the signature was the defendant's signature; and there is no instance to be found in the books of such an act being held to have been ratified by a subsequent recognition or statement. Again, in the cases cited the act done, though unauthorised at the time, was a civil act and capable of being made good by a subsequent recognition or declaration; but no authority is to be found that an act, which is itself a criminal offence, is capable of ratification. The decision at *Nisi Prius* of Crompton, J., referred to in argument, is inapplicable, it being uncertain whether the plaintiff in that case knew that the alleged signature of then defendant was forged, and there being no illegal contract in that case to forbear to prosecute; the same observation may be made upon the case from Ireland cited upon the authority of Burton, J. I am, therefore, of opinion that the rule must be made absolute for a new trial, and that upon this evidence the jury ought to have been directed to find a verdict for the defendant, or at all events (which is enough for the purposes of this rule), that if any question should have been left to the jury, it ought to have been whether the paper and the conversation taken together did not amount to the illegal agreement above mentioned.

My brother Channell and my brother Pigott concur in this judgment.

Rule absolute for a new trial.

It is said, authoritatively, by the *Law Times*, that the Judicature Bills, in their new form, will be laid before Parliament for the purpose of discussion during the recess, but will not be further proceeded with until the next session.

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COMMON LAW.

ELLIS V. McHENRY.

ELLIS AND ANOTHER V. McHENRY.

Bankruptcy—Effect of English composition deed in colony. Where a debt arises in a country over which the Legislature of another country has paramount jurisdiction, a discharge by the law of the latter may be effectual in both countries.

Therefore, where a debt arose in Canada under a contract to be performed there, and the debtor obtained a discharge here under the Bankruptcy Act, 1861,

Held, that such discharge was an answer to an English action on the contract, for it was a discharge of an original debt, binding in Canada as well as here.

But, where the action here was on a judgment obtained on such contract in Canada,

Held, that a similar discharge obtained here after breach, but before judgment in Canada, was no answer to the action, for the Canadian judgment was final between the parties, and the defendant was estopped from saying that the discharge might have been pleaded there.

(10 W. R. 608—C. F.)

In the first action, *Ellis v. McHenry*, the declaration was on a judgment recovered in the Court of Queen's Bench for Upper Canada, against the now defendant by the now plaintiff.

2nd plea.—That the causes of action, in respect of which such judgment was recovered, were debts and liabilities included in an inspektorship deed under the Bankruptcy Act, 1861, made between the defendant and all his creditors, and in respect of which the plaintiff, as a creditor, was entitled to a dividend under the deed, which was binding upon him and all the creditors of the defendant.

2nd replication to the 2nd plea.—That the defendant ought not to be permitted to plead the said plea, because the matters alleged therein could have been pleaded in the action in the Queen's Bench for Upper Canada as a defence to such action; wherefore the plaintiff prays judgment if the defendant ought to be admitted after judgment has been obtained in the said action as in the declaration mentioned to plead the said 2nd plea.

Demurrer to the above replication, on the ground that the deed, if pleaded, would not have been a good defence to the action in Canada.

8rd replication to the 2nd plea.—That the judgment in the declaration mentioned was obtained in respect of money payable by the defendant to the plaintiff under a contract between them for the execution of certain works by the plaintiff and the payment of certain money in respect thereof by the defendant to the plaintiff; and at the time of making such contract the plaintiff was, and has ever since been, domiciled in Upper Canada, and the said contract was made, and was to be performed wholly in Upper Canada, and the said works were to be wholly executed and the said money to be paid in Upper Canada.

Demurrer to the above replication, on the ground that it did not show why the inspektorship deed was not a bar to the plaintiff's claim.

In the second action, *Ellis and another v. McHenry*, the declaration was on the *indebitatus accounts*.

2nd plea.—The same *mutatis mutandis* as the second plea in the first action.

2nd replication to the 2nd plea.—That the debts in the declaration mentioned arose under and by virtue of contracts made in Canada, and

that the said contracts were wholly to be performed in Canada, and that the said debts were, under the provisions of the said contracts, to be wholly paid in Canada, and at the time when the first of the said contracts was made the plaintiffs were domiciled in Canada, and they continued so to be till the commencement of this action.

Demurrer to the above replication for showing no ground why the inspektorship deed was not a bar to the plaintiff's claim.

In last term, *Pollock, Q. C.*, (*Bompas* with him), argued for the plaintiff.

Quinn, Q. C. (*Beresford* with him), argued for the defendant.

Cur. ade. vult.

Jan. 30.—BOVILL, C. J., now delivered the judgment of the Court* as follows:—

The first of these cases was an action upon a judgment recovered by the plaintiff against the defendant in the Court of Queen's Bench in Upper Canada, the original cause of action having arisen upon a contract which was made in Upper Canada, and was to be wholly performed there.

The second action was not upon a judgment, but for a cause of action precisely similar to that in respect of which the judgment in the first action had been obtained.

In each case the defendant set up a deed operating as a discharge in bankruptcy under the English Bankruptcy Act, 1861 (24 & 25 Vic. chap. 184), which deed appears upon the proceedings to have been duly executed so as to be binding upon the creditors who had not executed it, and to have been so executed after the original cause of action in each case arose, though not after the recovery of the judgment on which the first action was brought. The principal and most material question that was argued before us was, as to the effect of this discharge upon the claims in these actions.

In the first place, there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England; and is a principle of private international law adopted in other countries. It was laid down by Lord King in *Burrows v. Jemio*, 2 Stra. 788; by Lord Mansfield in *Ballantine v. Golding*, Cooke's Bkcy. Law, 515; by Lord Ellenborough in *Potter v. Brown*, 5 East, 124; by the Privy Council in *Odwin v. Forbes*, Buck, 57; and *Quelin v. Moisson*, 1 Knapp, 265 b; by the Court of Queen's Bench in *Gardiner v. Houghton*, 2 B. & Sm. 743; and by the Court of Exchequer Chamber in the elaborate judgment delivered by Willes, J., in *Phillips v. Eyre*, L. R. 6 Q. B. 28.

Secondly, as a general proposition, it is also true that the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country: *Smith v. Buchanan*, 1 East, 6; *Lewis v. Owen*, 4 B. & Al. 654; *Phillips v.*

* BOVILL, C. J., WILLES, KRATING and BRETT, JJ.

Allen, 8 B. & C. 477; *Bartley v. Hodges*, 9 W. R. 692, 1 B. & S. 375.

But, thirdly, where the discharge is created by the legislature or laws of a country which has a paramount jurisdiction over another country in which the debt or liability arose, or by the legislature or law which governs the tribunal in which the question is to be decided, such a discharge may be effectual in both countries in the one case, or in proceedings before the tribunal in the other case. This is only consistent with justice in the case of bankruptcy, as the debtor is thereby deprived of the whole of his property, wherever it may be situated, subject to the special laws of any particular country which may be able to assert a jurisdiction over it. In the case of the Legislature of the United Kingdom making laws which will be binding upon her colonies and dependencies, a discharge, either in the colony or in the mother country, may, by the Imperial Legislature, be made a binding discharge in both, whether the debt or liability arose in one or the other; and a discharge created by an Act of Parliament here would clearly be binding upon the Courts in this country, which would be bound to give effect to it in an action commenced in the English courts. In *Edwards v. Ronald*, 1 Knapp, P. C. 259, it was decided that an English certificate in bankruptcy was a good answer to a debt arising in Calcutta and sued for in the Supreme Court there. In *Lynch v. McKenny*, 2 H. Bl. 564, a defendant who was sued in England for a debt contracted in Ireland was considered as discharged by an English certificate. In *The Royal Bank of Scotland v. Cuthbert*, 1 Ross, 462, 486, it was held by the Court of Session that an English certificate was a bar in the Scotch courts to a debt contracted in Scotland. And in *Sidaway v. Hay*, 8 B. & C. 12, a discharge under a Scotch sequestration in pursuance of an Act of the Imperial Parliament was held to be a good answer to an action in the English courts for a debt contracted in England. It was also laid down by Bayley, J., in *Phillips v. Allen*, 8 B. & C. 481, that a discharge of a debt pursuant to the provisions of an Act of Parliament of the United Kingdom, which is competent to legislate for every part of the kingdom, and to bind the rights of all persons residing either in England or Scotland, and which purported to bind subjects in England and Scotland, operated as a discharge in both countries. In *Armani v. Castrique*, 13 M. & W. 447, Pollock, C.B., says: "A foreign certificate is no answer to a demand in our courts; but an English certificate is surely a discharge as against all the world in the English courts. The goods of the bankrupt all over the world are vested in the assignees; and it would be a manifest injustice to take the property of a bankrupt in a foreign country, and then to allow a foreign creditor to come and sue him here." In the recent case of *Gill v. Barron*, L. R. 2 P. C. 176, the following passage occurs in the judgment of the Court as delivered by Kelly, C.B.: "It is quite true that an adjudication in bankruptcy, followed by a certificate of discharge in this country under the bankrupt laws passed by the Imperial Legislature, has the effect of barring any debt which the bankrupt may have contracted in any part of the world; and it would

have the effect of putting an end to any claims in the island of Barbadoes or elsewhere to which the appellant might have been liable at the date of the adjudication." In referring to the English certificate being a discharge of debts contracted in any part of the world, the Lord Chief Baron was, of course, speaking of the effect of such a certificate in a British court. The same distinction between the effect of Colonial and Imperial Legislation was very pointedly recognised by Wightman and Blackburn, JJ. in *Bartley v. Hodges*, 9 W. R. 693, 1 B. & S. 375; see also *The Amalia*, 1 Moo. P. C. N. S. 471. The case of *Ross v. McClood*, 4 Ct. Sess. Cas. 308, which was relied on by the plaintiffs, at first might seem to be opposed to these views, as it was there held that in a suit commenced in the Scotch courts an English bankruptcy and certificate were not a discharge of a debt contracted in Barbice. But the only question argued and really determined was, whether the debt was to be considered as having arisen in Barbice or in England; and the Court having decided that it was an English debt, it was assumed that it would not be barred by an English certificate, without any question having been raised or decided upon any other point. It is pretty clear from the statement of the law of Scotland in Bell's Commentaries, 6th ed. p. 1800, that only the international view was presented to the Court in that case, and that the paramount effect of Imperial legislation was not considered. The case of *Lewis v. Owen*, 4 B. & Al. 654, was also relied upon by the plaintiff; and it was, no doubt, there held that a certificate under an Irish bankruptcy was no discharge of a debt contracted in England; but in that case the principal question which was raised and decided was, whether the debt arose in England or in Ireland, and it being held to have accrued in England it was considered that the debt was not barred by the Irish certificate. The point as to the effect of Imperial legislation, however, did not arise, as the Irish bankrupt law at that time in force depended on statutes of the Irish Parliament passed before the union; and when a similar question arose as to the effect upon an English debt of an Irish certificate obtained under the provisions of an Act of the Imperial Legislature—viz., 6 & 7 Will. 4, c. 14—it was held that the Irish certificate was a bar to the English debt: *Ferguson v. Spencer*, 1 M. & G. 987. It was likewise held that a discharge in Scotland by a *cassio bonorum* under the general Scotch law, and which only discharged the person of the debtor, was no answer to an action brought in the English courts for recovery of a debt contracted in England: *Phillips v. Allen*, 8 B. & C. 477; but it was considered in that case, and there is the opinion of Bayley, J., before quoted, that the decision would have been the other way if there had been an absolute discharge created by an Act of the Imperial Parliament. And in *Sidaway v. Hay*, 8 B. & C. 12, it was expressly decided, as already mentioned, that a discharge under a Scotch sequestration, in pursuance of an Imperial statute, was a discharge in England from a debt contracted here. It has also been held that a discharge in Newfoundland under a special Act of the Imperial Parliament was a discharge in this country of a debt con-

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tracted in England: *Philpotts v. Reed*, 1 B. & Bing. 294. These authorities, therefore, seem to establish the third proposition by which this case must be governed.

There are nice distinctions which may sometimes arise where, though a contract is made in country, it is to be performed or take effect in one another, or is made under circumstances which show that it is intended to be subject to some law other than that of the place in which it was made: *Lloyd v. Guibert*, 6 B. & Sm. 100, 120, L. R. 1 Q. B. 115. But no such point arises in these cases, as the contracts out of which these debts arose were both made and to be performed in Upper Canada.

In the present case the discharge obtained by the defendant in England, under what is equivalent to an English bankruptcy, was created by an Act of the Imperial Legislature, which, like the previous Bankruptcy Acts, is of general application, and must receive a similar construction; and by force of that statute the deed operates as a general discharge of all debts. The discharge would therefore, in our opinion, be binding in Canada, and it is also clearly binding and effectual as an answer to proceedings commenced in the courts of this country. The result of this would be that the deed would operate as a discharge of the original debt in each case, and, therefore, be a good answer to the second action.

The first action, however, is upon a judgment which was recovered after the deed was completed. In the view which we take of this case the deed might have been set up as a defence to the action brought in Upper Canada; and it is averred as a matter of fact in the third replication, and not denied, that it might have been so pleaded. The question then arises whether it can now be brought forward in these proceedings as an answer to the judgment. When a party having a defence omits to avail himself of it, or, having relied upon it, it is determined against him, and a judgment is thereupon given, he is not allowed afterwards to set up such matter of defence as an answer to the judgment, which is considered final and conclusive between the parties. We are accustomed and indeed bound to give effect to final judgments of courts of other countries and of our colonies, where they possess a competent jurisdiction which has been duly exercised; and the correctness of such judgments is not allowed to be again brought into contest in our courts. The only ground on which the judgment in the first action was sought to be impeached upon the pleadings before us was that there was a defence to the original claim by the discharge under the deed; but that would go to impeach the propriety and correctness of the judgment, and is a matter which cannot be gone into after the judgment has been obtained, or in this action which is brought to enforce it—*ne lites immortales essent dum litigantes mortales sunt*: *Henderson v. Henderson*, 6 Q. B. 288; *Bank of Australasia v. Nias*, 16 Q. B. 717; *De Cossé Brissac v. Rathbone*, 6 H. & N. 801; *Scott v. Pilkington*, 2 B. & S. 11; *Vanguellin v. Boward*, 12 W. B. 128, 15 C. B. N. S. 341; *Castrique v. Imrie*, 19 W. R. 1, L. R. 4 H. L. 414. If it had been sought to impeach the judgment on the ground

of fraud the case might have been different: *Earl of Brandon v. Becher*, 3 Cl. & F. 479; *Phillipson v. Earl of Egramont*, 2 Q. B. 587; and the opinions of the majority of the Judges in *Castrique v. Imrie*, 19 W. R. 1, L. R. 4 H. L. 414.

Upon the argument a further question was raised as to the validity of the deed itself; and it was objected that it was invalid by reason of its containing a covenant by the creditors that they would not sue for their debts, and that, if they did so, the deed might be pleaded as an accord and satisfaction, and in bar of the suit or other proceeding. The effect of that, however, is not that the creditor is to forfeit his debt and to lose his dividend under the deed, but simply to prevent any action or proceedings to recover the debt itself, leaving the right to the dividend untouched; and this, according to the authorities, does not render the deed void.

Upon these grounds we are of opinion that our judgment should be, in the first action, in favour of the plaintiff, and in the second action, in favour of the defendant.

Judgments accordingly.

DIGEST.

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FOR NOVEMBER AND DECEMBER, 1870, AND JANUARY, 1871.

(Continued from page 140.)

LANDLORD AND TENANT.

1. D. was a lessee for years at a rent payable quarterly, and S. was mortgagee of the reversion; D., having no notice of the mortgage, paid to his lessor the amount of two quarters' rent before any of it was due: afterwards and before rent-day the mortgagee gave him notice to pay the rent to him. *Held*, that the transaction between D. and the lessor was not a payment of rent due, and that D. must pay the rent to the mortgagee.—*De Nicholls v. Saunders*, L. R. 5 C. P. 589.

2. Covenant in a lease that the lessors would at all times during the demise maintain and keep the main walls, main timbers, and roof in good and substantial repair, order, and condition. *Held* (MARTIN, B., dissenting), that an action on the covenant could not be brought against the lessors without notice of the want of repairs.—*Makin v. Watkinson*, L. R. 6 Ex. 26; 7 C. L. J. N. S. 128.

3. A debtor assigned by deed, for the benefit of his creditors, all his personal estate to the defendant, who executed the deed and acted under it. The debtor was a tenant from year to year of the plaintiff, but the defendant did no act to show his acceptance of the lease. *Held*, that the lease passed to the defendant

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by the assignment, and that he was liable for the rent.—*White v. Hunt*, L. R. 6 Ex. 32.

LEASE.—*See* CONTRACT, 1, 2; LANDLORD AND TENANT.

LEGACY.—*See* ANNUITY; EXECUTOR, 2; LIEN, 1.

LEX FORI.—*See* CONFLICT OF LAWS, 1.

LIEN.

1. A testator bequeathed a legacy to each of his daughters on condition that they should convey to his sons certain real estate; in case of their not performing the condition the legacies were to form part of the residuary estate, all of which he bequeathed to his sons. The daughters conveyed the real estate, but the legacies were not paid. *Held*, that the legacies did not constitute a charge on the real estate in the nature of a vendor's lien.—*Barker v. Barker*, L. R. 10 Eq. 438.

2. The articles of a company provided that the company should have a lien on the shares, debentures, and dividends of any member absolutely or contingently indebted to the company. H. was a member and a holder of debentures; he mortgaged his debentures, and certificates were issued to the mortgagees certifying that they had been entered on the register as the proprietors, but no notice was given to them of the company's lien. Subsequently calls were made on the shares of H., which were not paid. *Held*, that the company had waived their lien by their own conduct.—*In re Northern Assam Tea Co.*, L. R. 10 Eq. 458.

LIVE ESTATE.—*See* WILL, 2.

LIMITATIONS, STATUTE OF.

The Statute of Limitations (3 & 4 Wm. 4, c. 27, sec. 28), provides that a mortgagor shall not bring a suit to redeem but within twenty years, unless an acknowledgment of his title shall have been made in writing signed by the mortgagee; and when there shall be more than one mortgagee, such acknowledgment shall be effectual only against the persons signing it. Two joint mortgagees had been in possession for more than twenty years, and one of them made the acknowledgment. *Held*, that the acknowledgment must be by both in order to entitle the mortgagor to redeem.—*Richardson v. Founge*, L. R. 10 Eq. 275.

MAINTENANCE.—*See* EQUITY, 1.

MALICE.—*See* SLANDER.

MALICIOUS PROSECUTION.—*See* MASTER AND SERVANT, 1.

MASTER AND SERVANT.

1. Actions for assault, false imprisonment, and malicious prosecution. There was "a scuffle" in a railway-station yard between A. and two persons; W., the plaintiff, denied that

he took part in it, but after he had left the station and was walking away he was delivered into custody by A. A. was a constable in the employ of the defendants, under a rule by which he might "take into custody any one whom he may see commit an assault upon another at any of the stations, and for the purpose of putting an end to any fight or affray; but this power is to be used with extreme caution, and not if the fight or affray is at an end before the constable interposes." *Held*, that the act of A. was beyond the scope of his employment.

The defendants' attorney appeared to conduct the prosecution of W. The depositions of A. and other servants of the company contained evidence of violent assaults upon them in the exercise of their duty. *Held*, that there was no evidence of ratification, it not appearing that the original act was done on behalf of the company, nor that the attorney knew of the circumstances of the imprisonment; *held also*, that the *onus* was on the plaintiff to shew absence of probable cause, and there was no proof of it.

S. took part in the struggle above mentioned, and was wrongfully given into custody by A. *Held*, that there was evidence that A. was acting within the scope of his employment.—*Walker v. South Eastern Railway Co.*; *Smith v. Same defendants*, L. R. 5 C. P. 640.

2. The defendant owned a vessel, and employed K., a stevedore, to unload it. K. employed other laborers, and among them the plaintiff and D., one of the defendant's crew, all of whom were paid by K. and were under his control. While at work the plaintiff was injured by D.'s negligence. *Held*, that D. was acting as K.'s servant, and that the defendant was not liable.—*Murray v. Currie*, L. R. 6 C. P. 24.

See EQUITY, 1.

MISREPRESENTATION.—*See* VENDOR AND PURCHASER, 3.

MISTAKE.—*See* ARBITRATION; CARRIER; PRINCIPAL AND AGENT, 4.

MORTGAGE.

A mortgagee in possession sold, under a power of sale, part of the mortgaged estate for a sum greatly exceeding the interest and costs due. *Held*, that after paying the interest and costs due at the time of the sale, the mortgagee must apply the balance in part discharge of the principal, or pay it over to the mortgagor.—*Thompson v. Hudson*, L. R. 10 Eq. 497.

See EXECUTOR, 1; EXTINGUISHMENT; LIMITATIONS, 1.

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TATIONS, STATUTE OF; SECURITY; ULTRA VIRES, 8

NEGLECTANCE.

Servants of a railway company left out grass and hedge trimmings by the side of the railway for a fortnight; the summer was exceedingly dry, and a fire caught near the rails shortly after the passing of two trains, and a strong wind blowing at the time, ran across a stubble-field for two hundred yards, crossed a road, and set fire to the plaintiff's cottage. *Held*, that there was evidence for the jury that the defendants were negligent in not removing the cuttings, and that the fire originated from sparks from the engine; *also*, that they were responsible for the natural consequences of their negligence, and the distance of the cottage from the point where the fire originated did not affect their liability.—*Smith v. London and South Western Railway Co.*, L. R. 6 C. P. (Ex Ch.) 14; s. c. L. R. 5 C. P. 94; 4 Am. Law Rev. 717; 7 C. L. J. N. S. 102

See CARRIER; MASTER AND SERVANT. 2

NOTICE.—See ASSIGNMENT, 1; LANDLORD AND TENANT, 2; PATENT, 1.

NOVATION

1. H effected an insurance in the A. Company. Soon afterwards the A. Company amalgamated its business with that of the L. Association, and transferred it to their property and liabilities, the Association agreeing to indemnify the company. Afterwards the D. Association amalgamated its business with that of the B. Company. H. had notice of both amalgamations, and after the last one he received an allotment of profits from the B. Company, and took from them receipts for premiums. *Held*, that there was a novation of the contract with the B. Company.—*In re Anchor Assurance Co.*, L. R. 5 Ch. 632.

2. B. insured his life in the M. Association, which afterwards transferred its business to the C. Company; B. continued to pay his premiums to the latter, but the only evidence of his knowledge of the arrangement was the receipts, some of which stated that the M. Association was "Incorporated with the C. Company." *Held*, that the evidence was insufficient to establish a novation of the contract.—*In re Manchester and London Life Assurance and Loan Association*, L. R. 5 Ch. 640; s. c. 9 Eq. 643.

PARTIES.—See PRINCIPAL AND AGENT, 2. PARTNERSHIP.

Partnership articles provided that each year a balance-sheet should be made and signed by the partners, and should not afterwards be

opened unless a manifest error should be discovered therein, and then only to rectify such error; and on December 31 after the death of any partner, a similar account should be stated by the surviving partners, and the amount appearing to be due to the deceased partner should be paid by them to the executors. A partner died, and the books were balanced in the usual way. After the amount was made up, some of the assets then due to the firm were discovered to be irrecoverable. It was the practice of the firm to deduct an asset, which in calculating the profits of any year, had been dealt with as a good asset, and was afterwards discovered to be bad, from the profits of the year in which it was discovered. *Held*, that there was no mistake to be corrected and that the amount ought not to be interfered with.—*Ex parte Barber*, L. R. 5 Ch. 687.

PATENT.

1. The 15 & 16 Vic. c. 83, s. 35, provides that assignments and licenses under letters patent shall be registered, and that until such registry "the grantee or grantees of the letters patent shall be deemed and taken to be the sole and exclusive proprietor or proprietors of such letters patent, and of all the licenses and privileges thereby given and granted." *Held*, that although the assignment was unregistered, the assignee could maintain a suit for an injunction against the assignor and subsequent licensees of the assignor with notice. *Semble*, that when the assignment was registered, it would relate back.—*Hassell v. Wright*, L. R. 10 Eq. 509.

2. A chignon-maker obtained a patent for the use of "wool, particularly that kind known as Russian tops, or other similar wools or fibre, in the manufacture of artificial hair, in the imitation of human hair, and also in the manufacture of crisped or curled hair for furniture, upholstery, and other like purposes." *Held*, that the specification was too extensive; *also*, that the simple use of a new material to produce a known article is not the subject of a patent.—*Rushion v. Crawley*, L. R. 10 Eq. 522.

See EQUIT, 2.

PAYMENT.—See LANDLORD AND TENANT, 1.

PERPETUITY.—See POWER, 8; WILL, 6.

PLEADING.—See CRIMINAL LAW, 1.

PLEDGE.—See EXECUTOR, 1.

POWER.

1. By a marriage settlement lands were conveyed to trustees upon trusts for husband and wife for life, and after their decease for such of the children of A. as the wife should appoint; power was given to the trustees to

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sell and re-invest. The wife appointed the lands as to four-fifths upon trust for four of the children of A. in fee; and as to one-fifth for another child of A. for life, and after his decease for the four first named in fee; the child last named was of unsound mind, but not so found by inquisition. *Held*, that the trustees still had the power to sell and re-invest.—*In re Brown's Settlement*, L. R. 10 Eq. 849.

2. F. by will gave his property to trustees, upon trust to raise £500 for such persons as his daughter M. should appoint by will, and to hold the residue upon trust for such of his other children in such shares as M. should appoint by will. M. by will gave all her real and personal estate, "whatsoever and where-soever, and of which I have any power to appoint or dispose of this my will" to her brothers, to convert and out of the proceeds to pay her debts, and as to the surplus upon trusts in favor of her brothers and sister. M.'s debts did not exceed £500. *Held*, that both the general and special power were well exercised.—*Ferrier v. Jay*, L. R. 10 Eq. 560.

3. By a marriage settlement property was settled upon trust for E., the wife, for life, and after her decease for such of the children of marriage, with such provisos and conditions as she should appoint. She appointed one-fifth of the trust funds in trust to her daughter F. for life, for her separate use, "and so that she shall not have power to deprive herself thereof by anticipation," and after her decease, for such persons as she should appoint. E. died. *Held*, that the restraint upon anticipation violated the rule against perpetuities and was void, but the rest of the appointment was valid.—*In re Teague's Settlement*, L. R. 10 Eq. 564.

See CONFIDENTIAL RELATION; EXTINGUISHMENT.

PRACTICE.—See ACTION; PRINCIPAL AND AGENT, 2. PREFERENCE.—See EXECUTOR, 1.

PRESUMPTION.—See BILLS AND NOTES, 1; REVOCATION; TRUST.

PRINCIPAL AND AGENT.

1. The defendant employed the plaintiffs, tallow-brokers, to purchase 50 tons of tallow for him. The plaintiffs having other orders, made contracts in their own names for the aggregate quantity ordered, which was the usual course of business, and sent the defendant a bought note signed by them as brokers for 50 tons, "Bought for your own account." The defendant refused to accept the tallow. *Held* (by BOVILL, C. J., and MONTAGUE SMITH, J.), that the defendant was bound by the usage,

although not aware of it, and was liable for the tallow; *held* (by WILLES and KEATINGE, JJ.), that the plaintiffs were authorised to buy for the defendant and not to sell to him, and that the custom could not change the character of the transaction.—*Mollett v. Robinson*, L. R. 5 C. P. 646.

2. S. was an attorney practising under the name of S. & C.; C., also an attorney, was his clerk at a salary, but not a partner. The defendant employed the firm and was liable to them for a bill of costs. The jury found that C. had authorised S. to contract in behalf of both, and that he had so contracted. *Held*, that S. being the real principal might sue alone for the bill of costs.—*Spur v. Cass*, L. R. 5 Q. B. 666.

3. The defendants were trustees under a creditor's deed executed by P., a debtor, by which P. was to carry on his business under their superintendence, and pay over all his gains to the plaintiffs, who weekly paid to him money for the disbursements of the ensuing week; he had no actual authority to pledge their credit. The plaintiffs furnished goods upon P.'s order. *Held*, that under the deed the relation of principal and agent did not exist as to the business, and that the defendants were not liable.—*Easterbrook v. Barker*, L. R. 6 C. P. 1.

4. The defendant wrote to the plaintiffs to send a sample rifle, and that he might want fifty. Afterwards the defendant sent by telegraph a message to send three rifles. The telegraph clerk by mistake telegraphed the word "the" instead of "three," and the plaintiffs sent fifty rifles; the defendants refused to accept more than three. *Held*, that the defendant was not responsible for the clerk's mistake, and that there was no contract for more than three rifles.—*Henkel v. Pape*, L. R. 6 Ex. 7.

See ACTION; MASTER AND SERVANT, 1. PRIVILEGE.

A solicitor on examination was asked, "Where is J. C. residing at present?" The witness declined to answer the question, because he was the solicitor of J. C., and his residence came to the witness's knowledge in his professional capacity, and in the course and in consequence of his professional employment, and in no other way. *Held*, that the witness was not privileged from answering, the fact not having been communicated for the purpose of obtaining professional assistance.—*Ex parte Campbell*, L. R. 5 Ch. 708.

See SLANDER.

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PROBABLE CAUSE.—See MASTER AND SERVANT, 1.

PROXIMATE CAUSE.—See INSURANCE, 5; NEGLIGENCE.

RAILWAY.

When land is taken from a railway, no claim of statutory compensation can be made in respect of damage for which the claimant would not have had an action if the Railway Act had not been passed. The damage must be damage done in the execution of the works, and not afterwards when the railway is completed; and anticipated damages from noise of trains and smoke, which may accrue hereafter, are not proper subjects of compensation before they happen.—*City of Glasgow Union Railway Co. v. Hunter*, L. R. 2 H. L. Sc. 78.

See MASTER AND SERVANT, 1; NEGLIGENCE; ULTRA VIRES, 1.

RATIFICATION.—See CONFLICT OF LAWS, 2.

RECEIVER.

A receiver will not be appointed in a case of contested heirship to real estate, and a special case must be made out for the appointment of a receiver where an administrator has been appointed.—*Hichen v. Birks*, L. R. 10 Eq. 471.

REGISTRATION.—See PATENT, 1.

REMAINDER.—See SETTLEMENT, 2.

REMOVEDNESS.—See WILL, 6.

RENT.—See LANDLORD AND TENANT, 1; VENDOR AND PURCHASER, 2.

REVOCATION.

A will duly executed was found among a testator's papers; the signature had been cut out, but afterwards gummed on again. *Held*, that the presumption was that the testator cut it out with the intention of destroying the will, and that the presumption was not altered because the signature had been pasted on again.—*Bell v. Fothergill*, L. R. 2 P. & D. 148.

SALE.—See ESTOPPEL, 2.

SALVAGE.

The N. and the S. were steam-ships belonging to the same owners. The N., while on a voyage, observed the S. in a disabled condition, and by the exertions of her crew succeeded in bringing the S. into port. *Held*, that the crew of the N. were entitled to salvage.—*The Sappho*, L. R. 3 Ad. & Ecc. 142.

SECURITY.

L. & Co. mortgaged an estate in Guiana to K. & Co. to secure a cash credit to the extent of \$75,000; K. & Co. accepted bills for L. & Co. Both firms became insolvent. *Held*, that the mortgage was a security against the payment of the bills by K. & Co., and the bill-holders were entitled to the benefit of the security.—*City Bank v. Luckie*, L. R. 5 Ch. 778.

See BILLS AND NOTES, 1; ESTOPPEL, 1.

SETTLEMENT.

1. An unmarried woman, soon after attaining twenty-one, gave £3200 to trustees, and by a settlement it was declared that it should be held in trust for her for life, and for her children after her decease as she should appoint, and other trusts in default of appointment; the settlement gave her no power of revocation, nor of selecting new trustees. Upon a bill filed nine years after, *held*, that the settlement was improvident, and should be declared void.—*Everitt v. Everitt*, L. R. 10 Eq. 406.

2. By a marriage settlement it was covenanted that all the property, real and personal, which the husband or wife, or either of them, in right of the wife, should at any time during the coverture "become seized or possessed of, or entitled to," should be settled upon the trusts expressed in the settlement. The wife was long before her marriage entitled to a remainder in land after the decease of a tenant for life, who outlived her, so that the remainder did not fall into possession during coverture. *Held*, that the remainder was not included within the covenant.—*In re Pedder's Settlement Trusts*, L. R. Eq. 685.

3. By a marriage settlement the funds were to be held upon trust to "pay the income to the said (wife) for her separate use, independently of the debts or control of her said intended husband," without power of anticipation. The husband died, and the wife married the plaintiff. *Held*, that the income was limited to her separate use for life, and that the trust revived upon her second marriage.—*Hawkes v. Hubback*, L. R. 11 Eq. 6.

See POWER, 1, 3; WILL, 2.

SHIP.—See CHARTER PARTY; INSURANCE, 1; SALVAGE.

SLANDER.

The plaintiff was solicitor of H., who was rector of the parish in which the defendant lived; H. was also trustee for a widow and her children. The defendant said to H. in the presence of others: "Your name is pretty well up in the town of B.; your and your secondrel solicitor's names are ringing through the shops and streets of B.; you are spoken of as robbing the widow and orphan—you to build your church, and he to marry his daughter." The jury negatived malice. *Held*, that the communication was privileged, as the reports affecting H. could not be stated to him without stating those affecting the plaintiff.—*Davies v. Smead*, L. R. 5 Q. B. 608.

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SOLICITOR.—*See* PRIVILEGE.

SPECIFIC PERFORMANCE.

1. The plaintiff agreed to purchase, and the defendant to sell, certain real estate for \$24,000; and also that the furniture, which was worth about £2000, should be valued by valuers mutually agreed upon, and taken by the plaintiff at their valuation. The defendant refused to appoint a valuer, or to complete. *Held*, that the plaintiff was entitled to a decree for specific performance of the contract so far as it related to the real estate.—*Richardson v. Smith*, L. R. 5 Ch. 648.

2. A municipal corporation passed a resolution that it agreed to let to the plaintiff for three hundred years, certain land to be stumped out at the expense of the plaintiff, who should build a terrace as shown in a plan. A copy of the resolution was sent to the plaintiff, and he stumped out the land, entered into possession, built a terrace according to the plan, and paid the rent to the corporation for five years; at the end of that time they refused to give a lease. *Held*, that the agreement was made certain by the acts of the plaintiff in which the corporation had acquiesced and that he was entitled to specific performance.—*Crook v. Corporation of Seaford*, L. R. 10 Eq. 678.

See VENDOR AND PURCHASER.

STATUTE.

By 8 Geo. 4, c. 126, s. 82, persons going to or returning from "their usual place of religious worship" are exempted from all toll on turnpikes. A minister of the Primitive Methodist Connexion had assigned to him, by the persons having authority, the services at F. on three Sundays in a quarter, and at four other places on other Sundays. *Held*, that he was exempt from toll in going to and returning from F. on the three Sundays indicated.—*Smith v. Barnett*, L. R. 6 Q. B. 84.

See CONFLICT OF LAWS, 2; JURISDICTION.

SURETY.—*See* CONTRIBUTION.TELEGRAPH.—*See* PRINCIPAL AND AGENT, 4.TENDER.—*See* ESTOPPEL, 2

TRUST.

L. H. by his will in 1845 gave to each of his son's three daughters the interest of £1000 Reduced Annuities; in 1847 he transferred £3200 Reduced Annuities, being all his property, into his son's name, without any declaration of trust, and in 1849 died, having lived for the last ten years of his life with his son, who was a man of property. *Held*, that as the transfer was made to a child, the presumption was that it was intended as an advance-

ment to him for his own benefit.—*Hepworth v. Hepworth*, L. R. 11 Eq. 10.

See CONFIDENTIAL RELATION; GIFT; POWER, 1, 2; PRINCIPAL AND AGENT, 8; SETTLEMENT, 3; WILL, 3.

ULTRA VIRES.

1. A railway company being about to apply to Parliament for an act to make a branch railway which was to pass through the plaintiff's land, agreed with him that, in the event of the bill being passed, they would purchase certain land of him for £2000, and pay him £2000 more for damages; and the plaintiff agreed that he would sell the land and would not oppose the passing of the bill. The bill passed, but the company did not take any of the plaintiff's land. *Held*, that the agreement was not *ultra vires*, being dependent on the passing of the act, therefore to be regarded as if made after it had been passed.—*Taylor v. Chichester and Midhurst Railway Co.*, L. R. 4 H. L. 628; s. c. L. R. 2 Ex. (Ch.) 856; 2 Am. Law Rev. 284; 4 H. & C. 409.

2. The deed of settlement of an insurance company empowered the directors "to do and execute all acts, deeds, and things necessary, or deemed by them proper or expedient for carrying on the concerns and business of the society, and to enforce, perform, and execute all acts and things in relation to the society, and to bind the society, as if the same were done by the express assent of the whole body of members thereof." *Held*, that this clause gave the power of borrowing.—*Gibbs and West's Case*, L. R. 10 Eq. 312.

3. The articles of a company gave the directors power to borrow, and as security to "pledge, mortgage, or charge the works, hereditaments, plant, property, and effects of the company." *Held*, that this gave them no power to mortgage future calls.—*In re Sankey Brook Coal Co.* (No. 2). L. R. 10 Eq. 881.

See COMPANY, 1.

USAGE.—*See* PRINCIPAL AND AGENT, 1.

VENDOR AND PURCHASER.

1. In a contract for the sale of a house, it was stipulated that the purchase should be completed on the 26th February; and if it should not then be completed, the purchaser should pay interest on the purchase-money until the completion. The vendor failed to show within the specified time a good title to a portion of the land. The purchaser's object (as he informed the vendor) was to occupy the house as a residence, and he required immediate possession. A month after the day fixed the purchaser made requisitions on the

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title, and negotiations continued until the 7th April, when the purchaser gave notice of abandonment of the contract. *Held*, that if time was of the essence of the contract, it was waived by continuing the negotiations; and that the purchaser had not given reasonable notice of abandonment; specific performance decreed.—*Webb v. Hughes*, L. R. 10 Eq. 281.

2. In 1867 the plaintiff agreed to sell to a railway company a house in which he carried on business, the purchase-money to be paid on the 25th March, 1869; the plaintiff to be tenant to the company at a certain rent, the tenancy being determinable on the 25th March, 1869, by seven day's notice; and the company to pay interest on the purchase-money till completion. The interest and rent were paid up to the 25th March, and the plaintiff gave due notice to determine the tenancy on that day, but the company failed to complete the purchase, and the plaintiff refused to give up possession. A bill was filed for specific performance. *Held*, that the plaintiff was entitled to the purchase money with interest, and that the company was not entitled to rent after the 25th March, 1869.—*Leggott v. Metropolitan Railway Co.* L. R. Ch. 716.

3. The plan of a small piece of land offered for sale showed as one of the boundaries a straight line including a space about ten feet wide filled with shrubbery; trees in other parts of the land were drawn on the plan. The defendant, with the plan in hand, inspected the property, and saw on this side a small iron fence, apparently the boundary, outside of a belt of shrubs, and including three large ornamental trees. Supposing that the trees were included in the property he purchased it at auction. In fact, the fence and trees stood on the adjoining land. *Held*, that the defendant was deceived in a material point by the negligence of the vendors, and that the sale could not be enforced.—*Denny v. Hancock*, L. R. 6 Ch. 1.

See ASSIGNMENT, 1; DAMAGES, 4; LIEN, 1; SPECIFIC PERFORMANCE.

VOLUNTARY CONVEYANCE.—See SETTLEMENT, 1.

WAIVER.—See LIEN, 2.

WARRANTY.—See CONTRACT, 2; INSURANCE, 1.

WIFE.—See DAMAGES, 2.

WIFE'S SEPARATE ESTATE.—See SETTLEMENT, 3. WILL.

1. Devise upon trust for the testator's four children in equal shares during their respective lives, and after the decease of his children respectively, for such of their respective children as should attain twenty-one, or die under

that age leaving issue, and their heirs, so that the child or children of each of his children should take his or their parent's share only; and in case of a failure of such issue of either of his children, then in trust for his other surviving children or child in like manner as their original shares were given. One of the testator's children died in his lifetime leaving a child, E. V. After the testator's death another child, J., died without issue. *Held*, that the words "other surviving" should be read "other," and that E. V. would be entitled to a third of J.'s share, if she should attain twenty-one.—*In re Arnold's Trusts*, L. R. 10 Eq. 262.

2. A testator empowered his trustees to purchase fee-simple or freehold estates, and directed that the estates so purchased should be settled "in strict settlement," and to the same uses and upon the same trusts as his personal property. The personal property was limited to his daughter and her sons successively for life, with remainders to their children. *Held*, that in the settlement of the estates purchased, the tenants for life should not be unimpeachable for waste.—*Stanley v. Coulthurst*, L. R. 10 Eq. 259.

3. A testator gave to his wife his freehold estate, A., and all his personal property, "to be at her disposal in any way she may think best for the benefit of herself and family." *Held*, that the widow took a fee-simple in the real property, and an absolute interest in the personal property.—*Lambe v. Eames*, L. R. 10 Eq. 267.

4. Devise of real estate to testator's wife for life, remainder to his brothers, *nominatim*, in fee, as tenants in common; "and in case of the death of either of them in the lifetime of my said wife, leaving lawful issue, I give and devise the share of him so dying to all his children," in fee, as tenants in common; in case of the death of any of his brothers in the lifetime of his wife, without issue living at his death, his share to go to the surviving brothers. Three of the brothers died in the lifetime of the tenant for life; all had had children, a part only of whom survived their fathers. *Held*, that only those who survived their fathers were entitled to take.—*Hurry v. Hurry*, L. R. 10 Eq. 346, 2 C. L. T. N. S. 268.

5. Testator devised land to his son J. for life, remainder to his children; "and, in case my said son J. shall depart this life without leaving any lawful issue, then unto and equally between my sons G. and R. in the same manner as the estates hereinafter devised are limited to them respectively, subject, nevertheless,

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to the proviso hereinafter mentioned, in case my said son J. should leave a widow." He then devised separate lands to his sons G. and R., in terms precisely similar *mutatis mutandis*, and subject to the same proviso, which was as follows: "Provided that, in case any or either of my sons shall depart this life leaving a widow, then I give the premises so specifically devised to such one or more of them so dying unto his widow" for life. *Held* (BYLES, J. dissenting) that the widows were entitled to a life-interest in the Estates accruing to their husbands upon the death of one of the sons, as well as in the estates directly devised to them.—*Meloom v. Giles*, L. R. 5 C. P. 614.

6. Property was given by will upon trust to pay the income to S. for life, remainder to the eldest son of S. for life, remainder to E. for life, and after the decease of the survivor of S., his eldest son, and E., to transfer the same to all the children of S., and the child or children of such of the children of S. as shall then be dead; but in case there shall be no child or grandchild of S. then living, then to pay the same to the children of E. At the death of the testator S. had no child, but afterwards had four children. *Held*, that the children of S. were a class to be ascertained on the failure of the tenants for life, and that the gift to them was therefore void for remoteness.—*Stuart v. Cockerell*, L. R. 5 Ch. 713.

7. Testator gave all his estate, real and personal (subject to a life-estate in his wife), to M., her heirs, executors, &c., absolutely, if she should be living at the time of the death of his wife; but in case M. should die during the lifetime of his wife without leaving lawful issue her surviving, then over. M. died in the lifetime of the wife, leaving issue who survived her. *Held*, that M. took an absolute estate, with an executory gift over in the event of her dying without issue, and that her children were entitled.—*Finch v. Lane*, L. R. 10 Eq. 501.

See AMBIGUITY; ANNUITY; CHARGE, 2; ELECTION; EXONERATION; LIEN, 1; POWER, 2; REVOCATION.

WINDING UP.—See CONTRACT, 3; EXECUTOR, 2; JURISDICTION.

WITNESS.—See PRIVILEGE.

WORDS.

"In strict settlement."—See WILL, 2.

"Nephew."—See AMBIGUITY.

"Other surviving children."—See WILL, 1.

"Over."—See CONTRACT, 1.

"Port of loading."—See INSURANCE, 2.

"Until."—See INSURANCE, 4.

"Usual place of worship."—See STATUTE.

REVIEWS.

LA REVUE CRITIQUE DE LEGISLATION ET DE JURISPRUDENCE. Montreal: Dawson, Bros. January and April, 1871.

We welcome this publication, with no ordinary pleasure. It is of much promise, and the articles carefully selected and well written.

The prospectus, referring to the work, says, that "the editing committee have imposed upon themselves the task of combating, without hesitation, the errors and chief faults which present themselves in legislation or jurisprudence;" and it was, we understand, with especial reference to various unsatisfactory features in the conduct of business by their own judiciary that this Review was first thought of. Among its contributors, and those who have promised their support, we notice the names of the best men at the bar in Lower Canada.

It is a difficult and invidious task for individual members of the bar to call to account persons holding judicial positions with whom they are daily thrown in contact, nor is it pleasant to feel that a Judge who has the decision of your case in his hands, above suspicion of any ill feeling though he may be, may perhaps still be smarting under a severe criticism of his law, or remarks on his want of attention or industry.

So far as Upper Canada is concerned there has never been anything of this kind; but the Bench of the Lower Province has never, we think we may safely say, equalled ours either in industry, mental force, dignity, or general eminence. We have never felt any pressing need of sharp criticism on the conduct of our Judges. Some of them, of course, have been more dignified, learned or talented than others; but all, to the best of their ability with more or less laborious research, have, with most commendable diligence, endeavoured to discharge their duties faithfully to the public, and have done so with credit to themselves and to their profession, ever keeping in view the high honour and dignity of their office.

It is reported that all this cannot be said of their brethren to the east of us, though nothing is farther from our thoughts than to insinuate aught against them as being anything but honorable and upright Judges. It

REVIEWS.

is complained (at least we are so informed) that not only do they not write their judgments, but also very generally simply state the result of their deliberations, without giving the reasons on which their judgments are founded. The former practice, though not essential, is very useful and satisfactory, but without the latter the confidence of the Bar cannot be retained. The reckless conflict of decisions also sometimes leads counsel to suspect that a judgment has resulted, not from an anxious scrutiny and comparison of the authorities, but from thoughtlessly trusting to a crude notion of what might seem at first glance to be the proper adjustment of the disputed point.

The Review before us, conducted by some of the most fearless and best of the profession in the Province of Quebec, intends to try the effect of a little wholesome criticism in the hopes of remedying some of the defects of their Judges in the conduct of public business, so far, at least, as such conduct comes strictly within the bounds of proper public comment. But it is not alone in this respect that the Review will be useful, as will be seen by reference to its contents (which we shall now more particularly refer to), for the articles shew an intention to discuss fully and impartially the public questions which affect the Dominion.

La Revue Critique is published quarterly, each number containing about one hundred and twenty pages, much the same in shape and size as the English *Law Review*. The articles are written some in French and some in English, at the option of the contributor—and as to this we wish that they were all in English, as much is lost to many outside of the Province of Quebec which would be instructive and interesting to them, and we would submit to the editors the propriety of taking a hint in this matter, if it is contemplated increasing the circulation of the Review beyond the limits of that Province.

The articles in the first number are—A Discussion of the Alabama Question; The Fishery Question; The Provincial Arbitration, wherein the Quebec view of the matter is strongly urged; My First Jury Trial; A Review of Mr. Kerr's work on "The Magistrate Act of 1869;" a Summary of Decisions, &c.

The second number, just to hand, commences with an essay on the conflict of commercial jurisdictions, added to and altered

from an article which appeared some time ago in this journal, headed "*Lex loci contractus—Lex fori*," from the pen of M. Girouard, a talented and rising member of the Quebec bar. The same gentleman also discusses in this number "*Le droit constitutionnel du Canada*," and "*The Joint High Commission*." The Hon. E. T. Merrick, of New Orleans, contributes an article on the oft-quoted Laws of Louisiana; Mr. W. H. Kerr, who occupies a leading position at the Bar in Montreal, writes about deeds of composition and discharge under the Insolvent Act; also about the Navigation of the River St. Lawrence, and has a few words to say—to be amplified, he says, hereafter—about the observations of the *American Law Review*, on the Fishery Question, to which we alluded last month. A few useful hints are given to legislators by M. Racicot. The secretary of the committee of management then, in a few pages, gives, without note or comment, what cannot but be looked upon as a most curious picture of the state of the decisions in the Court of Appeal. Side by side are placed extracts from different judgments, the most conflicting and contradictory; not merely conflicts between different Courts and different Judges, but contrary opinions expressed by the same Judges at different times. If there is nothing in these cases which could, on a careful examination, reconcile such apparently opposite opinions, we can well fancy that the task of giving an opinion on a case submitted to counsel must be a much more hopeless task in the Province of Quebec than in any other civilised country that we are aware of.

La Revue Critique has arisen mainly from the alleged necessities of the case, and whilst fully endorsing the view so well established and acted on in England, that judicial opinions on matters brought before the Judges of the land in their public capacity, are open to free, but fair and respectful comment, we trust the editors may carefully keep within the due limits they have prescribed to themselves, and not weaken the moral force of the judicial office, whose claim to respect and confidence is somewhat different in a new country like this from what it is in England, and in many ways somewhat weaker, but which must, on the other hand, both in England and every other country, in the long run, lie in its own inherent excellence and integrity.

LAW OF EVIDENCE IN ONTARIO.

DIARY FOR JULY.

1. Sat. *Dominion Day.* Long Vacation begins. Last d. for Co. Coun. to eqn. assessm. rolls. Last for Co. T. to cer. taxes due on occup. lands.
2. SUN. *4th Sunday after Trinity.*
3. Mon. Co. Court Term (ex. York) begins. Heir and Devisee Sittings commence.
4. Tues. Last day for notice of trial for Co. Court, York.
5. Sat. County Court Term (except York) ends.
9. SUN. *5th Sunday after Trinity.*
11. Tues. Gen. Sessions and County Ct. Sittings of York. Last d. for Master and Reg. in Chan. to remit fees to P. T.
15. Sat. *St. Swithin.*
16. SUN. *6th Sunday after Trinity.*
18. Tues. Heir and Devisee Sittings end.
23. SUN. *7th Sunday after Trinity.*
25. Tues. *St. James.*
30. SUN. *8th Sunday after Trinity.*

THE

Canada Law Journal.

JULY, 1871.

LAW OF EVIDENCE IN ONTARIO.

A great change in the law of evidence has been made in this Province, and, so far, the result seems to have been, on the whole, satisfactory. It is to be hoped that the evils which were anticipated by many will not necessitate what could only be looked upon now as a retrograde movement; but it is perhaps too soon to form any opinion on the subject from the little light as yet given by the experience of the working of the act in this country.

The advance has been in the direction of abolishing all exceptional cases, and making the admissibility of all evidence the rule, and leaving the credibility of that evidence to constitute the true test of its value. The technical rules as to amount of interest are no longer in force. Being a party upon the record is no longer an objection. Plaintiffs and defendants may examine themselves and their opponents, their co-plaintiffs and their co-defendants to the hearts' content of each and all of them. There seems good hope that in the long run the cause of truth and justice will be served by the late legislative action, which has been taken in the direction indicated.

There are yet, however, five classes of exceptions, preserved by the Ontario Act, 33 Vic. chap. 18 sec. 5, as to some of which we propose to make a few observations—but do so only on the assumption that the change has been a step in the right direction, which however we do not propose further to discuss:

Sub-division *a* provides that nothing in the Act shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. In other words, the law, as it stood before this statute, is not interfered with. And that law was the old common law rule that neither husband nor wife is competent to give evidence for or against the other, that other being a party, plaintiff or defendant. This rule was avowedly founded on principles of public policy. It was to secure, as has been well said, "the maintenance of peace and union in domestic life, whose quiet would be disturbed, and whose whole order and economy would be overthrown, if the confidences that exist between man and wife were to be rudely dragged before the public eye." The rule was well expounded by Mr. Serjeant Best in arguing *Monroe v. Twisleton*, Peak. Add. Cas. 219, "When two persons are placed in the situation of man and wife, the law precludes every inquiry from either, which might break in upon the comfort and happiness of the married state, and therefore it will not suffer one to give evidence which may affect the other, because such evidence might, as Lord Hale expresses it, create implacable quarrels and dissensions between them."

This rule, however, has, of late, been infringed upon in England to this extent, that husband and wife are now competent witnesses for or against the other except in so far as regards *communications* between them during coverture, which are held privileged. This may, perhaps, be the correct limit of the rule so far as it is founded on reasons of public policy, and the further extension of the privilege may be of doubtful propriety. A subsequent Parliament of Ontario may possibly re-consider the point whether it is necessary for us to retain the rule as at common law; thereby rendering the husband or wife of a party in any suit a totally incompetent witness for such party in that suit.

It has been held at common law that the disability to give evidence as to matters occurring during coverture continues, even after the marriage has been dissolved by death. Thus in *Doker v. Hasler*, 1 Ry. & Moo. 198; Best, C.J., held that in an action by an executor, the testator's widow could not be called for the defendants to give evidence of a conversa-

LAW OF EVIDENCE IN ONTARIO.—THE ECCLESIASTICAL COURTS.

tion between herself and her husband. So in *O'Connor v. Marjoribanks*, 4 M. & Gr. 435, where in an action of trover for goods by the husband's executor, it was held that his widow was not admissible as a witness to prove that she had pledged the property in question with the defendant by her husband's authority. So it has been held under the old law that if a woman, who was once legally the wife of a man be divorced *a vinculo matrimonii* by Act of Parliament, she cannot afterwards be called as a witness against him to prove any fact which happened during coverture, though she is competent to give evidence of transactions, which took place subsequent to the divorce. See *Pea. Evid. p. 188, Munroe v. Twisleton*, Peak. Add. Cas. 221.

These authorities shew the precise value of another exception in the Ontario Statute. We refer to sec. 5 sub-div. c.:—"Nothing herein contained shall render any husband compellable to disclose any communication made to him by his wife during coverture, or shall render any wife compellable to disclose any communication made to her by her husband during coverture." This clause cannot refer to any period during the continuance of the coverture, for then it is to be embraced in the more extensive language of sub-div. a of this section. It must mean that after the death of either husband or wife, the survivor (widow or widower) is competent to give evidence of communications made during the coverture, but is not compellable to do so, and as to such communications may plead privilege in respect thereof. This clause will, no doubt, be held to apply also to a case of divorce. If our interpretation be right, then husband or wife, after death, or divorce, or either, may be compelled to give evidence of matters that occurred during coverture, where the knowledge of such matters does not arise, from any communication between husband and wife.

The sub-sections we have referred to afford a curious illustration of the compromise character of this statute. It is, we think, a sort of transitional Act of Parliament, half-way between the retention and the abolition of privilege in matters of evidence. Sub-division a maintains the old rule of common law; sub-division c greatly encroaches thereupon, and in so far assimilates our law to that of the present statute law of England.

Similar uncertainty of principle obtains as to the last sub-division of this section; whereby it is provided that parties to actions by or against personal representatives of a person deceased, are not competent witnesses as to any matter occurring before the death. To be consistent the Legislature should have extended the prohibitions to actions by or against the real representatives as well. But here again it is a matter for grave consideration whether the best course is not, as in England, to erase this clause from the statute book and let the evidence be given for what it is worth. The Courts in England have laid down a rule which perhaps, if we agree to the principle of the change, affords a sufficient safeguard here in cases within this sub-section: namely, that no one shall take a benefit or succeed against the estate of any deceased person upon a case resting solely on his own unsupported testimony.

SELECTIONS.

THE ECCLESIASTICAL COURTS.

Supposing that I had exhausted the humorous phases of the law, I have been for several months cultivating a spirit of dullness and heaviness that has evoked praise from our English legal cousins. But these transatlantic friends must not complain at any breaking out again, like the last words of the late Dr. Baxter, for, in this instance, their own peculiar laws and law reports furnish the occasion.

I know of no more humorous reading than the reports of the ecclesiastical cases, as given in the columns of the Law Journal Reports by those facetious gentlemen, George H. Cooper and George Callaghan, Esquires, barristers at law. We have nothing like them among ourselves, owing to the infidel separation of church from state, which prevails to some extent in this country. Let it not be understood, however, that we are without the blessings of ecclesiastical councils. We have them, but they are a law unto themselves, and our law courts are forced to get on as well as they can without the presence or countenance of the clergy. Perhaps our immunity is not to be regretted, for, of all the assemblies of mankind upon the face of the earth, from the earliest days down to the present time, the most reckless and unregardful of the laws of God and man is an assembly of clergymen. An assembly of women is conservative in comparison. Even a moot court of school boys has more regard for the rules of evidence. And for ingenious malice, tricky evasions and a cruel spirit of rivalry, I imagine that nothing on earth affords a parallel. If I were a clergy-

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man, and should have to be tried for any imaginable offence, I should prefer a tribunal of the Camanches, or even the Sioux, to one composed of my fellows, for the injustice inflicted by these Indian tribes would not be perpetrated under the forms and pretence of religious charity.

The recent advent of ritualism in the English church has given rise to considerable interference on the part of the ecclesiastical courts, and I am not sure but that it has demonstrated the utility of such institutions. It is certain that a court of law cannot be imposed on by such evasions as would succeed in a clerical court; and it is controlled by legal rules of evidence and interpretation. Consequently, those English clergymen who have lately gone into the millinery business, and have been evincing an undue fondness for the ways of the scarlet woman, are having a hard time of it before the Lord High Chancellor and those other lords who constitute the Privy Council, to say nothing of the clear and inexorable logic of Dr. Phillimore, Dean of the Court of Arches.

The Reverend Alexander Heriot Mackonochie, clerk in holy orders in the church of England, and incumbent of the parish of St. Albans, seems to be a tough customer. He was charged by a round head fellow, named John Martin, with having, during the prayer of consecration in the order of the administration of the holy communion, knelt or prostrated himself before the consecrated elements, and also with using lighted candles on the communion table during the celebration of the holy communion, when such candles were not needed for the purpose of giving light; also with elevating the paten and the cup above his head, with using incense, and with mixing water with his wine. The court below "monished" him in respect of all the enormities, save the kneeling and the candles, but declined to give costs. 37 L. J. R. (N. S.) Ec. Cas. 17. From the refusal to monish, the puritan Martin appealed to the Privy Council, mainly, it is to be suspected, on the question of costs. The report of the decision on appeal is full of good reading. 38 L. J. R. (N. S.) Ec. Cas. 1. The court held, first, that the priest is intended by the rubric to continue in one position during the prayer of consecration, and not to change from standing to kneeling, or *vice versa*; and that he is intended to stand, and not kneel. Second, that the candles, as a ceremony, are unlawful, having been abrogated. Thirdly, that the lighted candles are not ornaments, within the meaning of the rubric. Counsel struggled hard for the candles, claiming that they had been used ever since the year 1100, but the court held the doctrine of ancient lights inapplicable to the case. And their lordships, with due regard to the dignity of the law, advised Her Majesty that the clergyman should pay the round head's costs.

One would suppose that the Rev. Alexander

Heriot Mackonochie was now pretty stringently tied up, but, "for ways that are dark and for tricks that are vain," this particular clergyman is "peculiar." He ceased to "elevate the elements above his head," but merely elevated them as high as his head: he put out the candles just before communion, still allowing them to stand; and, instead of kneeling, he bent one knee, occasionally touching the ground with it. The hard-headed Mr. Martin followed him up, and moved the privy council to enforce obedience to their monition. 39 L. J. R. (N. S.) Ec. Cas. 11. The ingenious reverend gentleman made a very pretty argument, in person, in his own defence, which deserves rehearsing, as to the kneeling, at least. He says: "It is defined in Bailey's Dictionary, 'to bear oneself upon the knees.' I maintain, as regards the charge of kneeling, that kneeling is a distinct posture. The body must rest upon the knees. It is true, Dr. Johnson gives a different definition, but all his four examples fall within Bailey's definition; 'to perform the act of genuflexion,' 'to bend the knee.'

'When thou dost ask my blessing, I'll kneel down, And ask of thee forgiveness.'—*King Lear*.

'Ere I was risen from the place that shewed My duty, kneeling, etc.—*Ibid*.

'A certain man kneeling down.' Matt. xvii, 14. 'At the name of Jesus every knee should bow.' Phil. ii. 10. Bowing the knee is a distinct act from kneeling. Bishop Taylor says, 'As soon as you are dressed, kneel down.' *Guide to Devotion*. In every instance, in the prayer book, 'kneeling' is used to express the going upon the knees. Two things are necessary to a kneeling, first, that the body should rest upon the knees; secondly, that it should be for an appreciable time." He did not claim that his genuflexions were the result of any weakness in the knees, but boldly said, "I bend the knee as an act of reverence." This, of course, put the matter beyond any doubt, and, in respect to the kneeling, the court held that his peculiar evasion left him but one leg to stand on in physics, and none at all in law, and monished him not to do so any more. In respect to the candles, they expressed their disapprobation of the trick, but held that the reverend blower-out was, technically, within the monition. As to the elevation of the elements, the same may be said, the court holding that the point was not perfectly before the court, but declared that they should hold, if it ever became proper for them to do so, that "any elevation, as distinguished from the raising from the table," is unlawful. One would suppose that, having cornered him on the charge of kneeling, the court would have shown some respect for their own decrees by punishing the infringement, but this clerical flea was not so easily caught. He had, like the prudent man, foreseen the evil, and hidden himself behind an affidavit that "he had never intentionally or advisedly,

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in any respect, disobeyed or sanctioned any practices contrary to the provisions of the monition;" i. e., he supposed he had successfully evaded them. Their lordships thought themselves bound, as christian gentlemen and lawyers, to give the affiant the benefit of this christian-like and gentleman-like, if not lawyer-like, affidavit, and so declined to punish him further than "to mark their disapprobation of such a course of proceeding"—to wit, the kneeling—"by directing that he should pay the costs of the present application," which, after all, I dare say, is no light punishment in England. This ingenious clergyman, who thought to evade the decree of the court against kneeling by bending one knee only, should have remembered the fate of "Peeping Tom," of Coventry, that

"one low churl, compact of thankless earth,
The fatal by-word of all years to come,"

who, when Lady Godiva was riding by, "clothed on with chastity," risked one eye at an auger hole, and whose

—"*eyes*, before they had their will,
Were shrivelled into darkness in his head,
And dropt before him."

But if he had possessed that acquaintance with the scriptures which I have (through the medium, in this instance, of Webster's Unabridged Dictionary) he would, on leaving the presence of this tyrannical court, have hurled at them this parting text: "And he *kneeled down* and cried, with a loud voice, Lord, lay not this sin to their charge." Acts, vii, 60.

But we have not yet done with the reverend caviller. In November, 1870, the Privy Council were invoked to punish him for fresh disobedience to the monition, in respect to prostration and elevating the paten and cup. It was alleged and admitted that he had removed the wafer bread from the paten, and elevated the bread, instead of the paten; and it appeared that the upper part of the cup was elevated above the head. The accused claimed that the elevation was accidental and unintentional; but, as he admitted that he had carefully scanned the monition with the determination to yield only a literal obedience to its precise letter, the court held that he must suffer for even a literal violation, on the principle that they that take the sword shall perish by the sword. The accused, also, having met with such bad fortune in his genuflexions, notified his curates that he intended thenceforth to bow without bending the knee, at that part of the prayer of consecration where he had formerly knelt, and so, instead of kneeling, he made a low bow, and remained in that position several seconds. This the court held to be an unlawful prostration of the body. He was amerced in costs, and suspended from office for three months, and thus left with nothing to hold up but his hands, and with full liberty to bow his head if he had any shame left.

In January, 1870, "the office of the judge was promoted"—whatever that may be—"by the bishop of Winchester against the Rev. Richard Hooker Edward Wix, vicar of St. Michael and All Angels, Swanmore, in the Isle of Wight." The vicar was charged with ecclesiastical offences, namely, with having caused two lighted candles to be held on either side of the priest, while reading the gospels, and with having lighted candles on the communion table, or on a ledge or shelf immediately above it, having the appearance of being affixed to and forming part of it, during the celebration of the holy communion, at times when they were not needed for light; also, with using incense, etc., etc. In respect to the first charge, the vicar admitted and defended the practice, but the court held it unlawful, and "monished" him. In regard to the second charge, Wix becomes a dangerous rival to Mackonochie, in the science of evasion, for, although he admits the lighted candles, yet, he says they were not on the communion table, on the ledge or shelf behind it, but on a separate table, called a re-table, not appearing to form a part of the communion table. I think, on the whole, he is rather superior to Mackonochie, for the latter had to put his candles out just before communion, but Wix defiantly kept his burning by means of the convenient re-table. But, it appearing in evidence that the re-table was placed directly behind the holy table, and had a shelf or ledge, which looked like a mantel-piece over the holy table, the court held that this would not answer, and so Wix and his candles were put out. As to the incense, Wix claimed that the censuring was done only during the interval between morning prayers and communion, accompanied by processions and tinkling of bells, and that the censuring was not within the prohibition of the law, because it was not done during any service. But the court thought there was no sense in this argument; Wix might as well claim that a slice of ham is no part of a sandwich, because it is between two slices of bread; and he was monished against this practice also, and condemned to pay costs, which last probably incensed him most thoroughly. 39 L. J. R. (N. S.) Ec. Cas. 25.

In the same report, at page 28, is found the case of *Elphinstone v. Purchas*, in which the matters of vestments, mixing water with the wine, administering the bread in form of wafers, etc., were gravely and elaborately considered. The defendant did not appear, and so the plaintiff, who was a colonel in the army, had a clear field. After eleven pages of discussion and examination, Dr. Phillimore concludes that Mr. Purchas might wear all the regalia which he was accused of wearing, except "a cope at morning or at evening prayer; also, with patches, called apparel; tippets of a circular form; stoles of any kind whatsoever, whether black, white or colored, and worn in any manner; dalmatics and

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maniples." The "biretta" or cap appeared to the doctor "as innocent an ornament as a hat or a wig, or as a velvet cap." Processions and incense were pronounced illegal. Blessing the candles was forbidden. So, as to announcing "a mortuary celebration for the repose of a sister," and interpolating a prayer for the rest of her soul. Wafers were not disapproved of, nor was mixing water wine so long as it was not done at the time of the celebration. Placing on the table a veiled crucifix, and unveiling it and bowing, and doing reverence to it, was deemed objectionable. But flowers on the holy table were approved. It was held, for the sake of protestantism and good manners, that the priest must not turn his back on his people, except during proper prayers. It only remains to remark, that placing a figure of the infant Saviour, with two lilies on either side, and a stuffed dove, in a flying attitude, over the credence and the holy table, respectively, was reprehended. All this occupies twenty-five double-columned pages of the report. But, on appeal, all the "eucharistic vestments," including the innocent "biretta," were held unlawful, and the clergy were restricted to the poverty of cope and surplice; the use of the mixed chalice and wafer bread was also pronounced illegal.

So much for rites and ceremonies. But, when we come to the efforts of the courts to keep the ritualists straight in doctrinal matters, we are lost in amaze. Take the case of *Sheppard v. Bennett*, for instance. 39 L. J. R. (N. S.) Ec. Cas. 68. The charge was, that the defendant inculcated the doctrine of the visible presence of our Lord in the elements, and the adoration of the elements themselves. The language used was: "Who myself adore and teach the people to adore Christ, present in the sacrament, under the form of bread and wine, believing that under their veil is the sacred body and blood of my Lord and Saviour Jesus Christ." The language at first was, "to adore the consecrated elements, believing Christ to be in them," but this was corrected as above. The court held that this amended language does not necessarily imply a belief in the actual presence, and an adoration of the elements themselves. The words by which it is preceded, however, would seem to render this judgment extremely charitable, to say the least: "I am one of those who burn lighted candles at the altar in the day-time; who use incense at the holy sacrifice; who use the eucharistic vestments; who elevate the blessed sacrament."

If, after believing and doing so much, he does not believe what he is accused of, he must be remarkable. If a man should tell us, "I am copper-colored; I go nearly bare and paint my body, and wear rings in my lips and nose; I live in a wigwag; I sail in a birch-bark canoe; my weapons are bow and arrow, knife and club; I am in the habit of scalping my enemies, and of getting intoxi-

cated on whisky; but I am not an Indian,"—the natural inquiry would be, What are you, then? And if you should believe him, for the reason that a great many other Indian disclaimants had told you the same story, you would use exactly the reasoning that Dr. Phillimore uses to arrive at his conclusion, at the end of fifty-three pages of fine print, in double columns. Peter, the patron saint of all these credulous theologians, persisted in denying his Master, although his "speech betrayed him." The learned Doctor hopes that nothing that he has said may further tend to

—"make this banquet prove
A sacrament of war, and not of love."

He says he does not sit "as a critic of style, or an arbiter of taste, or a censor of logic," and has "not to try Mr. Bennett for careless language, for feeble reasoning, or superficial knowledge." And he concludes that Bennett is saved from harm by the fact, that, in sentencing him, he should be passing sentence "upon a long roll of illustrious divines who have adorned our universities and fought the good fight of our church, from Ridley to Keble; from the divine whose martyrdom the cross at Oxford commemorates, to the divine in whose honour that university has just founded her last college." And he showed his leniency toward freedom of religious opinion by making no order as to costs. 'I must do the doctor the justice to say that he does not seem to regret his enforced decision, and even cites the decision of the privy council, that the words "everlasting fire" might be treated by a clergyman as not denoting the eternity of punishment.

But the humour of the matter consists in the necessity of having a court to adjudge what religious opinions a man may or may not teach, and what rites and ceremonies he may or may not observe. Of course, it is the theory of government that renders this necessary, but the humour of it is none the less apparent on that account. If our clergymen take leave of their senses, we soon find a way to restore their wits—we cut off their temporal supplies. If we disagree with our clergyman, we don't let him turn us out—we turn him out. Our theory is that the clergy and the Sabbath are made for man, not man for the clergy and the Sabbath. All judicial inquiries into one's religious opinions and ceremonial preferences strike us oddly. We do not see, of course, why the lord high chancellor should not be just as well invoked at the complaint of the Royal Geographical Society, to monish a man against saying and publishing that the world is flat, or, at the instance of Mr. Froude, to warn a rival historian against pretending that Henry VIII was not a conjugal saint. In short, affairs proceed in this country upon the principle of the menagerie-keeper, who, when asked whether a certain animal was a monkey or a baboon, replied: "Whichever you please—you pays your money, and you takes your choice."—*Albany Law Journal*.

THE ELECTION BILL AND THE PROFESSION.

THE ELECTION BILL AND THE PROFESSION.

The ballot makes personation easy and detection difficult; it vastly facilitates the process of bribery, by removing the fear of discovery and punishment.

Bribery will not be prevented by merely moral influences—that is proved by all experience. No party hesitates to resort to it when necessary to success. No man, however virtuous in profession, was ever known to vote against his party because they were winning by corruption; he is content to share the spoils of victory and ask no questions. In very truth, nobody really looks upon it as a crime or upon a man who gives or takes a bribe as he views a thief. Everybody would prefer to win an election by honest means, but he would prefer to win by bribery rather than be beaten. Nothing but fear of the penalties really operates to deter, and even they go no further than to introduce more contrivance and caution in the conduct of the business. Whatever reduces the risk of discovery enormously increases the temptation alike to give and to take bribes.

It is scarcely denied that the ballot makes bribery comparatively easy and safe; but its advocates contend that, though it will not make men less willing to take bribes, it will make them less ready to offer bribes, because they cannot secure the fulfilment of the corrupt contract. Voters, it is said, will accept bribes from all, and promise all, and can only give to one; a man who will take a bribe will not hesitate to break his promise. This argument, however, assumes much that is not true in fact. The truth is, as our readers very well know, the great majority of the voters who take bribes perform their contracts faithfully. There is a strange point of honour among electors in this matter. They do not look upon the taking of a bribe as a moral, but only as a legal, offence; in their estimation there is nothing wrong in it, and it is only a question of safety from penalty. They think it very wrong to break a promise, and not one in twenty of those who accept a bribe without shame and without the most severe pricking of conscience vote otherwise than they had agreed to vote for the consideration given.

It must not, therefore, be hoped for that bribery will be diminished under the ballot, because the buyer will be unable to secure the vote he has bought. Even if individual votes could not thus be counted on, another form of bribery, practised largely in America, will certainly be adopted here. Wherever the ballot exists, bribery is conducted thus: Clubs, workshops, societies of men, sell themselves, not individually, but in the mass. The negotiation is conducted between a trusted man on both sides. It is intimated that the society will vote together; what one does all do; little is said, but much is understood;

signs are more expressive than words: under a stone in a field, in a hole in a hedge, the representatives of the society after the conference with the Man in the Moon find a certain sum of money. It is divided among the members, and the ballot of all is for the same man. If it be asked how they can be trusted, the answer is, that they well know that if they were to prove false they would soon spoil the market. But if there is a fear of such a consequence, the last resort is to buy conditionally that the buyer is returned,—the purchase-money not being paid till after the election.

This is not a theoretical evil, but one rampant at every election in the United States, and as familiar to the people there as was the head money to the electioneers of twenty years ago in this country.

The ballot will practically extend the area of corruption by providing facility for concealment of the facts. It will create a new and large class of corrupt voters.

Our readers experienced in elections are well aware that there are many voters who would gladly take a bribe, but dare not do so for fear of discovery. They have been partisans their lives through; they are connected with some church or chapel; they have always worn one colour, or called themselves by one name; and they know well that, if they were to vote against the party they had been associated with, all the town would be assured, as if it had been done before the eyes of all, that they had been bought. But these men, and they are many, would gladly put money into their purses if they knew that they could do so without discovery, and this the Ballot will enable them to effect without possibility of danger.

But it is said the penalties for bribery will continue as before; why should they be less effective to deter or to punish?

For this reason—that the means of detection are immensely diminished. Bribery is usually discovered now by this; that certain persons who had promised one party, or who were usually attached to one party, are seen to vote for the other party. It is then well known what was the inducement, and every detective engine is set in motion to obtain proof of the fact. But where the vote is not known, this is impossible; the clue to the act of bribery is lost, and in practice there is perfect impunity.

This, too, is confirmed by the experiences of the Ballot in all countries. If bribery is to be employed, the Ballot makes it easy and safe, as, indeed, its advocates do not deny; they assert merely that no man will think it worth his while to spend money in purchasing votes which he cannot secure. The answer to this is given above, and as it is contended it will be here so it is actually found to be in the United States.

Thus we encourage increased bribery and extended personation, for what?—to prevent one elector in a hundred from being influenced

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to vote against his will. To protect one coward twenty honest men are demoralised. Surely this is paying dear for a trifling benefit.

We have already shown that the much desired object of the promoters of the Ballot—the exclusion of the profession from the conduct of elections—is impracticable. The considerations here suggested with respect to the encouragement and protection it will provide for bribery, fully support that view—*The Law Times*.

The bill for legalising marriage with a deceased wife's sister has been again rejected by the Lords, although carried repeatedly by large majorities, in the Commons. Surely this is a question on which the opinion of the constituencies ought to prevail. It is merely permissive. It does not compel any person to do anything to which he or she objects; it only enables those who wish to do something, and who have no such objection, to do it if they please. Because some persons have religious scruples upon it, they have no right to impose their creed upon others who have no such scruples. The alliance is simply a question of taste, for the consideration of the parties alone, and to prohibit them from an act harmless in itself is a violation of the liberty of the subject. The alleged social objections are merely pretences, for the law is of very recent date, and no such evils as are prophesied were found to exist before the change to the present prohibition. Previously to the existing statute such marriages were voidable only, and not void; but, inasmuch as nobody cared to take the proceedings necessary to avoid them, they were practically legalised—were largely adopted, and not one mischief was ever found to result from them. It should be well understood that the real opposition comes from a party who object on ecclesiastical grounds, and who, on that account, ought personally to abstain from such an alliance. But there is no reason why they should impose their creed upon others who hold a different opinion.—*Law Times*.

Mr. Wickens is to be the new Vice-Chancellor, and will be sworn in on Monday. Like Mr. Justice Hannen, Mr. Wickens has never "taken silk." Of his appointment there is little more to be said than that it will give general satisfaction, except perhaps to a few Queen's Counsel who would have preferred a selection from among the silk-gownmen, because it must have set afloat a certain amount of senior business. Mr. Wickens is one of the soundest lawyers at either bar, besides being unusually versed in equity pleading, and he cannot fail to make an excellent Vice-Chancellor. Like Sir W. M. James, he gave great satisfaction as judge of the Lancaster Chancery Court.

CANADA REPORTS.

ONTARIO.

ELECTION CASES.

WEST TORONTO ELECTION CASE.

(ARMSTRONG V. CROOKS.)

Controverted elections Act, 1870, 33 Vic., Cap. 21, Sec. 58
—Return to writ—Time for filing petition—Holidays—*Form of petition—Treating.*

- Held*, 1. That the twenty-one days limited for filing an election petition after the return of the writ are to be reckoned from the time of the receipt of the return by the Clerk of the Crown in Chancery, and not from the time of mailing by the returning officer.
2. Good Friday and Easter Monday are holidays within the meaning of the Act, and they are not to be reckoned in computing the twenty-one days.
3. The joint effect of Stat. Ont. 33 Vic., cap. 21, and the Ontario Interpretation Act, 31 Vic., cap. 7, sec. 1, is, that when the word "holiday" is used it includes the above days as "set apart by Act of the Legislature."
4. The word "treating" refused to be struck out of the petition though not specifically prohibited by the Act [Chambers, May 17, 1871.—*Hagarty, C. J., C. P.*]

The respondent was the member elect for the West Riding of the City of Toronto. On the 4th April the returning officer mailed his return to the Clerk of the Crown in Chancery, under sec. 52 of 32 Vic. cap. 21; and on the following day this return was received and filed by that officer. On the 1st May the petition was filed, which in general terms charged the respondent or his agents with bribery, treating, and undue influence, following the form recited in the case of *Beal v. Smith*, L. R. 4 C. P. 145.

Bethune, on behalf of the respondent, obtained a summons calling on the petitioner to show cause why the petition should not be struck off the files, on the ground that it was filed after the period of twenty-one days from the return to the writ of election; or if filed in time, to amend it by striking out the allegation of "treating" or otherwise, so as to state an offence contrary to the statute in that behalf.

The points mainly relied on were:—that the twenty-one days commence to run from the date of the return, or from the date of mailing: that the first and last of the twenty-one days are inclusive, and that Good Friday and Easter Monday, which intervened during that period, are not holidays within the meaning of the act, not having been "set apart by the Legislature."

R. A. Harrison, Q. C., showed cause.

The intention of the Legislature was to give twenty-one clear business days within which to file the petition.

The time runs from the receipt by the Clerk of the Crown in Chancery, and not from the date of or from the time of mailing the return. If never received in the Chancery, great difficulties would arise from holding that the mere mailing of the return was sufficient.

The day on which the return was made is to be excluded: *Pugh v. Duke of Leeds*, Cowper, 714; *Wilson v. Pears*, 2 Camp. 291; *Ammerman v. Digges*, 12 Irish C. L. Rep. Appendix I; *Isaacs v. Royal Insurance Co.*, L. R. 5 Ex. 296; *Pegler v. Gurney*, 17 W. R. 316; *Id.*, L. R. 4 C. P. 235.

As to holidays, the Ontario Interpretation Act and the Election Act must be read together. The latter excludes days set apart as public holidays by the Legislature of Ontario, and in

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the former the word "holidays" includes, among other days, Good Friday and Easter Monday.

As to striking out the allegation of treating, see *Beal v. Smith*, L. R. 4 C. P. 145; *Rogers on Elections*, 8th edn.; *Clarke on Elections*.

Crooks, Q. C. (in person), and *Bethune*, supported the summons:

Rule 166, under the Common Law Procedure Act, should apply, and both days are included: *Morell v. Wilmot*, 20 U. C. C. P. 378; *Morris v. Barrett*, 7 C. B. N. S. 139. Proceedings on a petition are similar to suits, and the rules applying to the latter should apply to them. As to the rule of computation at common law, see *Regina v. Justices of Derbyshire*, 7 Q. B. 193; *Regina v. Justices of Middlesex*, 2 Dowl. N. S. 719; *Re v. Justices of Middlesex*, 17 L. J. M. C. 111.

The returning officer was *functus officio* from the time he made his return, and had completed a perfect act as soon as he executed the return. The Clerk in Chancery was not a public officer, and was under no obligation to show his papers or to give any information; and the public and the candidates would not be injured by the returning officer failing to send the return to the clerk, as the returning officer had to file his returns also in the Registry office, and had to send a copy to each candidate.

As to the holidays, the statute is explicit, and our Interpretation Act should not be referred to except in case of doubt or the silence of the particular act. The act excepted public holidays "set apart" by the Legislature of Ontario. No such holidays, and in fact no holidays, had been so set apart; and these words, "set apart," mean *hereafter* to be set apart. What was meant was a non-working day—a day like Sunday. *Coke*, 2 Inst. 264, shows that there is a distinction between the kinds of holidays; and the Legislature had this in contemplation when in the one act they declared Good Friday and Easter Monday "holidays" merely, and in the other act they excepted "public holidays." And see *Tomlin's Law Dictionary*, "Holiday," *Lush's Prac.* 352.

HAGARTY, C. J., C. P.—It is first contended, for respondent, that the twenty-one days are to be reckoned from the time of the returning officer making or mailing his return, and not from the time of its being received by the Clerk in Chancery. This depends on the meaning of section 6 of the Controverted Elections Act of 1871. The words are: "The petition shall be presented within twenty-one days after the return has been made to the Clerk of the Crown in Chancery of the member to whose election the petition relates," &c. By section 52 of the 32 Vic. cap. 21, the returning officer, as soon as he receives all the poll-books, adds them up, &c., "and shall within ten days thereafter make and transmit his return by mail to the Clerk of the Crown in Chancery; and he shall also, upon application, deliver to each of the candidates or their agents, or if no application be made, he shall within the same period transmit by mail to each candidate a duplicate of such return, which duplicate shall stand in lieu of an indenture." Section 56 provides that "the returning officer shall forward to the Clerk of the Crown in Chancery, with his return to the writ of election, the original poll-books and lists of voters used at that election, duly certified as such by him."

The respondent contends that when the returning officer makes and mails his return, his duty is completed; that the return has then been made to the Clerk in Chancery, and that the twenty-one days then begin to run. I am of opinion that the time is to be reckoned from the return, i. e., the actual return into the Clerk in Chancery's office or custody, and that the mere act of the returning officer in making his return and mailing it to the Clerk is not what is meant by the words used. It appears to me that the idea is, that the return under section 52, and the original poll-books and lists of voters, are to be finally placed on record, as it were, in the Clerk's office, where all such records are to be collected and kept; and when it is said "after the return has been made to the Clerk of the Crown in Chancery," it is the same as if the words were "after the writ of election and return thereto, &c., have been returned into Chancery," which latter words I think must clearly mean, then actually being in the Clerk's custody.

The respondent argues that there is no provision for inspecting the records in the Clerk's office, and the petitioners have no legal right to search there. Be that as it may, I do not think it can affect the decision. If the returning officer making and duly mailing the return commences the twenty-one days, then if by a post-office blunder the papers went astray and did not reach the Chancery till the lapse of twenty-two days, the time would have expired, and the return had never been actually made to the Clerk in Chancery in the sense of giving that officer custody of the record. If we were speaking of a writ of execution, and either by statute or rule of court a party to a suit had the right to take some further proceeding within twenty-one days after the return of such writ made by the sheriff to the court from which the writ issued, my strong impression is that the twenty-one days would certainly count from the actual receipt of the returned writ into the court, and not from some day when a sheriff in Ottawa or Sandwich wrote his return and put it into the post office properly addressed to the clerk of the court, even though, as here, he was by law directed to make and mail such return to the court. If the writ or return here had been lost or destroyed in transmission, and never reached its address, there would of course be a remedy, and another return must be made, as best could be done, and the twenty-one days would count from the actual receipt in Chancery of the substituted return. The provision in section 56 for the simultaneous return of the original poll-book, &c., to the Clerk in Chancery, affords another reason, I think, to show that the time should count from the actual depositing of all these records in the proper department, where any objection apparent on their face could be properly examined.

I notice in the Controverted Elections Act of Canada, Con. Stat. Can. cap. 7, sec. 3, a provision that "if the day on which the return upon such election is brought into the office of the Clerk of the Crown in Chancery is a day on which Parliament is not in session, or is one of the last fourteen days of any session, then the petition shall be presented within the first fourteen days of the session of Parliament commencing and held next

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after the day on which such return has been so brought into the office of the Clerk in Chancery," &c. The preceding statute had provided for the returning officer making an indenture with the electors as to the return, and section 70 provided for his transmitting the original poll-books with the writ of election and his return to the Clerk of the Crown in Chancery. I cite this as merely illustrative of the meaning Parliament has placed upon somewhat ambiguous words. My opinion on this point is against the respondent.

It is next objected that the petitioners have no right to exclude Good Friday and Easter Monday from the twenty-one days. Section 52 of our late act says, "In reckoning time for the purposes of this act, Sunday and any day set apart by any act of the Legislature of Ontario for a public holiday, fast or thanksgiving, shall be excluded." The respondent contends that the Legislature has never in fact set apart any day for a public holiday. This is true in terms; there has been no specific setting apart of any such day. But the petitioners rely on the Ontario Interpretation Act, 31 Vic. cap. 1. Section 7 says, "Subject to the limitations in the 6th section (which provides that 'unless it be otherwise provided, or there be something in the context or other provisions thereof indicating a different meaning or calling for a different construction,' &c.), in every act of the Legislature of Ontario to which this section applies, * * * (18thly,) the word 'holiday' shall include Sunday, New Year's Day, Good Friday, Easter Monday and Christmas Day, the days appointed for the birthdays of her Majesty and her Royal successors, and any day appointed by proclamation for a general fast or thanksgiving." Now, as it appears to me, the weight of respondent's objection is that our late act says "any day set apart by any act of the Legislature, &c., for a public holiday;" and that, as a matter of strict construction, the Legislature never has in terms set any day apart. Had the words been "Sunday and any public holiday, fast or thanksgiving," I do not think there could be any serious question but that the Interpretation Act would require us to read it so that the word "holiday" should include Good Friday, Easter Monday, &c. If respondent's contention be right, there can be no holiday in Ontario on this Election Act, unless and until an Act be passed expressly setting certain named days apart. We must of course read the two clauses together. It would then read in popular language thus, "Whenever we, the Legislature use the word 'holiday,' we declare that by that we mean Good Friday, Easter Monday, &c., and any further days appointed by proclamation, &c. Then we tell you in the Election Act, in reckoning time, not to include any day which we, the Legislature, set apart as a public holiday, fast or thanksgiving. We have already declared that by holiday it means these days in question."

It is to be noted that the "fast or thanksgiving" is not fixed or to be fixed by Act of the Legislature, it is by proclamation. So that by respondent's argument a proclaimed fast or thanksgiving could not be excluded from the reckoning, as it was not so set apart by any Act of the Legislature. But I consider the

"setting apart by Act of the Legislature" has in this cause been already defined in the case of a fast or thanksgiving, where it shall be proclaimed as such. I think in the same manner the words "public holiday set apart by Act of the Legislature" is answered. The joint effect of the two clauses read together is that when the word "holiday" is used, it includes these two days as being set apart by Act of the Legislature.

I observe in the Election Act of 1868-9 the word "holiday" does not occur, but section 80 declares that the day of polling shall not be a Sunday, New Year's Day, Good Friday, Christmas Day, First of July or Birthday of the Sovereign. In the Interpretation Act of Canada, 22 Vic. ch. 5 sec. 12 defines what the words "holiday" shall include—Sunday, New Year's Day, Epiphany, Annunciation, Good Friday, &c., omitting Easter Monday and any day appointed by proclamation, &c. In the Dominion Interpretation Act, 31 Vic. ch. 1 sec. 15, it says the word "holiday" shall include Sunday, Good Friday, &c., &c., Easter Monday and any day appointed by proclamation. It should be observed that in these interpretation Acts the word is "holiday," not "public holiday." I do not consider the respondent has succeeded in making any valid distinction between the words for the purposes of this application.

I decide against the objections. I think, in so doing, I obey the directions of our Interpretation Act in giving the words before me, "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment according to their true intent, meaning, and spirit."

The remaining questions are as to amending the petition by striking out the allegations of "treating" or otherwise so as to state any offence contrary to the statute. The petition is drawn in the widest and vaguest terms. It charges simply "bribery, treating and undue influence." This general form seems sanctioned by the English Practice (See *Beal v. Smith*, L. R. 4, C. P. 145), where the allegations seemed precisely similar. Bovill, C.J., in giving judgment, says:—"It seems to me that it sufficiently follows the spirit and intention of the rules, and no injustice can be done by its generality, because ample provision is made by the rules to prevent respondents being surprised or deprived of an opportunity of a fair trial by an order for such particulars as the Judge may deem reasonable."

Our statute does not specifically prohibit "treating" by name, and certain provisions in the English Acts as to giving meat or drink to individuals are omitted. Our statute, section 61, prohibits the furnishing of entertainment to any meeting of electors assembled for the purpose of promoting such elections, or pay for, procure or engage to pay for, any such entertainment, except at a persons residence. Now, I do not feel at liberty to insist in an alteration in the form of the petition, as possibly under the general term of "treating" some matter may be gone into, coming within our law.

*Summons discharged.**

* From the above judgment the respondent appealed to the Court of Queen's Bench, but the decision was upheld.—Eds. L. J.

C. L. Cham.]

DAMER ET AL. V. BUSBY.—BLACK V. WIGLE.

[C. L. Cham.]

COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, ESQ., Barrister-at-Law.)

DAMER ET AL. V. BUSBY.—BLACK V. WIGLE.

Capias.—Setting aside order to arrest—Discharge of prisoner—
—Relative powers of Court and Judge—
C. S. U. C. c. 22 s. 31, c. 24 s. 4.

Applications having been made to set aside two orders for arrest, with the writs and subsequent proceedings, on the ground that the affidavit to hold to bail in one case was untrue and insufficient, and in the other case was not entitled in any Court, and was insufficient in substance, and because there was a variance between the original writ and the copy served.

Held, 1. (following *Ellerby v. Walton*, 2 Prac. Rep. 147) that the affidavit to hold to bail is not irregular, though not entitled in a Court.

2. That a Judge in Chambers has no power to set aside an order to arrest, though he may, on hearing both parties, discharge the prisoner, or, by virtue of his general jurisdiction over procedure, may set aside proceedings subsequent to the order, for irregularity in this respect.

The variance between the writ and copy was corrected by amending the former, so as to conform to the latter.

Semble. The Judge to whom application is made for an order to arrest, has only to be satisfied of the existence of a cause of action, etc., and an intention on the part of defendant to abscond with intent, etc. The affidavit to hold to bail may be entitled in a court or cause, or one of them, or it may be altogether without a title; and it is sufficient to say that deponent "is informed and believes," if the source of his information be given.

The order itself can be rescinded only by the Court, but after arrest defendant may apply for his discharge on the ground of non-existence of the debt, or otherwise upon the merits, to any Judge in Chambers, or to the County Court Judge who granted the order. Such an application is not an appeal from the order to arrest, and new facts must be shown to warrant the discharge of the prisoner, unless it be granted on account of manifest and vital defect in the original material.

Either of these orders may be discharged or varied by the Court, which possesses over the original order to hold to bail.

(1) a general appellate jurisdiction on the identical material which was before the Judge,

(2) an express statutory jurisdiction to rescind the order upon a motion made to discharge the prisoner.

In addition to this, the Court has also co-ordinate jurisdiction with a Judge in Chambers, or the County Court Judge who granted the first order, to discharge the prisoner upon merits appearing in the affidavits of both parties.

[Chambers, May 15, 1871.—Gwynne, J.]

DAMER ET AL. V. BUSBY.

The defendant having been arrested and being in close custody under a writ of *capias* issued upon an order dated the 6th day of May instant, made by Hagarty, C. J. C. P., directing the defendant to be held to bail in the sum of \$214.90 at suit of the plaintiffs, obtained a summons from the same Chief Justice on the 10th instant, calling on the plaintiffs to shew cause why the fiat or order for the writ of *capias* issued in this cause, the said writ of *capias*, the copy and service, and the arrest of the defendant thereunder, or some or one of them, and all subsequent proceedings had by the plaintiffs herein, should not be set aside with costs as irregular and void, on the following grounds:—

1. That there were no or not sufficient facts and circumstances disclosed by the affidavits filed in support of the said order or fiat, to warrant the same being made or granted, in that the same do not follow the Act of Parliament in shewing that the defendant was justly and truly indebted to the plaintiffs at the time of the making of the said affidavit.

2. That in fact the papers filed, purporting to be such affidavits, were not and are not in fact affidavits.

3. That the same were not and are not, styled or entitled in any court.

4. That the said fiat or order, and the precept for the said writ, or either of them, are not and were not styled or entitled in any court or cause.

5. That it is not shewn by the said affidavits that the plaintiffs had good reason to believe and did verily believe that the defendant was immediately about to leave or quit Canada with intent and design to defraud them of their just debts, and the omission of the words "for money payable by the defendant to the plaintiffs" in the said affidavit, renders the same insufficient to warrant the granting the said order or fiat.

6. That it is not alleged in the said affidavits, that the plaintiffs or person or persons making the said affidavits or either of them, had good reason to believe that the defendant was immediately about to leave Canada with intent and design to defraud the plaintiffs of a just debt, and the said affidavits filed in support of the said order or fiat are wholly insufficient to warrant the granting thereof.

7. That the paper purporting to be a copy of the said writ of *capias*, served on the defendant after his arrest, is not a true copy of the said original writ of *capias*, and in fact that the defendant was never served with a true copy of the said original writ.

8. That at the time of making the said affidavits there was no debt due by the defendant to the plaintiffs, for which he was, under any circumstances, liable to be arrested or held to bail.

9. That the affidavit of the plaintiff King in support of the said order or fiat does not shew his true place of abode;

And on grounds disclosed in the affidavits and papers filed in support of this application.

This application was supported by the affidavits of the defendant and of others, stating matter offered to displace matter contained in the affidavits upon which the order to hold to bail was granted, and for the purpose of establishing that the defendant had no idea or intention of leaving Canada at all, and also for the purpose of establishing that the defendant was not indebted to the plaintiffs in any sum, upon the allegation that the goods which he had purchased from the plaintiffs were purchased on a credit which had not yet expired.

Verified copies of the affidavits upon which the order to hold to bail had been granted were filed, and also verified copies of the original writ of *capias*, and of the copy served upon the defendant.

Upon the return of the summons, the plaintiffs' attorney asked to enlarge the summons in order to answer upon affidavit the special matters contained in the affidavits filed by the defendant in support of his application. In order to dispense with this enlargement, counsel for the defendant agreed to waive all grounds of application except such as consisted in the insufficiency of the affidavits upon which the fiat was granted, and the variance between the original writ and the copy served. Upon these points only, therefore, the case was argued, the

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plaintiffs' attorney having upon this suggestion of defendant's counsel, abandoned his application to enlarge the summons. The effect of the above arrangement was to exclude from consideration wholly the 8th ground of objection above stated, and all the special matters alleged in the affidavits filed by defendant.

Upon the argument it appeared that in truth the 1st, 5th, and 8th, of the above objections were identical, for the alleged defect in the affidavit stated to exist under the 1st objection turned out to be that the affidavit of John Dwight King, one of the plaintiffs, alleged the defendant to be justly and truly indebted to him and his co-partners (naming them) in the sum of \$214.90 for "goods sold and delivered by me, and my said co-partners to the said Busby at his request"—whereas it was contended that the affidavit should have stated Busby to be indebted to King and his co-partners in the sum of \$214.90 "for money payable by Busby to King and his co-partners for goods sold and delivered, &c., &c., &c.;" and also because the affidavit alleged that the deponent King had "just" reason to believe, instead of "good" reason; and that he did believe that Busby was immediately about to quit Canada, "for the purpose of defrauding me and my co-partners as well as his other creditors of their just debts," instead of "with intent and design to defraud," &c., &c.

The 2nd and 3rd objections appeared to be but one, the reason for which it was contended under the 2nd head that the papers filed as affidavits were not affidavits, being that they were not entitled in any court as stated in the 3rd head.

The variance between the original writ and the copy thereof served, pointed at by the 7th objection, was that in the original the plaintiffs were styled, "W. Damer, J. Damer and J. D. King," whereas in the copy served they were styled, "William Damer, John Damer and John D. King."

The defect or irregularity pointed at by the 9th objection appeared to be that King's affidavit ran thus—"I, John Dwight King, of the city, in the county of York, merchant, make oath and say," there being no city named.

Mr. Richie (Morphy & Morphy) shewed cause: The decision of the Judge in granting the order to arrest can only be reviewed by the Court. No single Judge can set it aside and render liable to an action of trespass those who have acted under it; *Burness v. Guiranovich*, 4 Ex. 520. If this were true, a County Court Judge, who has by C. S. U. C. c. 24 s. 4, concurrent powers with the Superior Court Judges, might set aside the orders of the latter, which was never intended. *Terry v. Comstock*, 6 U. C. L. J. 235; *McInnes v. Macklin*, 1b. 14; *Allman et ux. v. Kensell*, 3 Prac. Rep. 110.

The affidavit need not be entitled until filed with the Clerk of the Process: *Ellerby v. Walton*, 2 Prac. Rep. 147; *Molloy v. Shaw*, 6 C. L. J. N. S. 294. The word "may" is permissive not imperative: C. S. U. C. c. 2 s. 18 s. 2. The words "money payable" are not necessary here, as the form used in the affidavit clearly shows a debt in *præsentia*: *Lucas v. Goodwin*, 4 Sc. 502, 3 Hodges 32.

The Court cannot enquire into the existence of a cause of action: *Brackenbury v. Needham*, 1 Dowl. 439; unless defendant clearly shew that there is none: *Shirer v. Walker*, 2 M. & G. 917. The affidavit sufficiently shows plaintiff's place of abode; there is only one city in the county of York, and defendant could not be misled.

Blevins, contra.

BLACK V. WIGLE.

On the 20th April the defendant obtained a summons from Hagarty, C.J.C.P., calling upon the plaintiff to show cause why the order of the Judge of the County Court of the County of Essex, bearing date the 8th day of April, 1871, the writ of *capias ad respondendum* issued thereon, and all other proceedings in the cause, should not be set aside with costs on the following grounds:—

1. That the affidavit on which the said order was made and the said writ issued, is not entitled in any court or in the court in which this action is brought.
2. That the said writ of *capias* issued out of the Court of Common Pleas, while the said affidavit, if entitled at all, is entitled in the Court of Queen's Bench.
3. That no cause of action against the defendant is disclosed upon the said affidavit.
4. That the said affidavit does not disclose any sufficient grounds for making the said order.
5. That the said defendant is not and was not when the affidavit was sworn, about to leave Canada.

This summons was obtained upon a verified copy of the affidavit upon which the order to hold to bail had been obtained, and several affidavits were offered to show that the defendant has not, and in fact never had any idea or intention of leaving Canada, one of the persons making such affidavit being a person named Adams, referred to in plaintiff's affidavit as one source of his information that defendant was immediately about to leave Canada with intent to defraud him unless he should be arrested.

The summons had been enlarged from time to time until the 11th May. At the argument the defendant's counsel abandoned the 1st objection as already decided, and the 2nd also. The plaintiff, in answer to the defendant's affidavits, filed several affidavits, for the purpose of showing that the defendant's intention was and still is to leave Canada with intent and design if he can thereby defeat the plaintiff's recovery in this action, and explaining away the effect of Adams' affidavit, and tending to establish that the plaintiff had good reason to believe and that there is good reason to believe that the defendant would have absconded if not arrested.

It appeared that the defendant was not in close custody, but that he had given bail to the Sheriff.

The defendant's counsel rested his argument chiefly upon the alleged defect in the affidavit to hold to bail, in not disclosing, as he contended a sufficient cause of action. The point of the objection is that although the affidavit alleged positively that the defendant had seduced the plaintiff's daughter, and that on the 30th day of

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March, his daughter, only 16 years of age, was delivered of a child, whereby plaintiff had lost and was deprived of her services, and had incurred expenses in and about nursing his said daughter, and in and about the delivery of her said child, and that plaintiff has a good cause of action against the said Alexander Wigle the younger, of over one hundred dollars, to wit \$2,000 in respect of such loss of services and expenses aforesaid; yet the affidavit did not allege that Alexander Wigle, the younger, was the father of the child of which plaintiff's daughter had been delivered; and for the absence of this allegation, it was contended that the affidavit disclosed no cause of action.

Spencer shewed cause:—The omission of the Court from the title of the affidavit is not an irregularity: *Ellerby v. Walton*, 2 Prac. Rep. 147; *Molloy v. Shaw*, 6 C. L. J. N. S. 294. Even if it were, the objection being merely technical, leave would be given to amend: *McGuffin v. Oline*, 4 Prac. Rep. 184; *Cunliffe v. Mallass*, 7 C. B. 701; and this notwithstanding the proceedings are by way of arrest: *Swift v. Jones*, 6 U. C. L. J. 68; *Fround v. Stokes*, 4 Dowl. 125; *Primrose v. Baddely*, 2 Dowl. 350; *Sugars v. Concanen*, 5 M. & W. 80.

If the arrest is set aside on this ground, leave should be given to re-arrest: *Perse v. Browning*, 1 M. & W. 362; *Talbot v. Bulkeley*, 16 M. & W. 198.

As to the 2nd objection, that the cause is in the C. P., while the affidavit to hold to bail is sworn before "a Commissioner in B. R."—see Con. Stat. U. C. c. 39, secs. 1, 6 & 8. The words of the affidavit sufficiently disclose a cause of action, and the decision of the Judge who granted the order cannot be reviewed here: *McGuffin v. Oline*, *ubi supra*; *Terry v. Comstock*, 6 U. C. L. J. 235; *Palmer v. Rodgers*, *Id.* 188; *Hargreaves v. Hayes*, 5 E. & B. 292; *Runciman v. Armstrong*, 2 C. L. J. N. S. 165.

Osler, contra.

May 15.—Judgment in both cases was now delivered by

GWYNNE, J.—In *Hopkins v. Salembier*, 5 M. & W. 428, A. D. 1839, the application was made to the full court, and it was for a rule to shew cause why the capias should not be set aside, and the bail bond given up be cancelled, on the ground that the affidavits were insufficient, and also upon affidavits denying that the defendant was about to leave the country. The rule was discharged upon the sole ground that the rule *nisi* should have asked to set aside or rescind the Judge's order, and not to set aside the capias; for if that should be set aside the Sheriff would be made a trespasser; and the court held that where the application is rested upon the insufficiency of the affidavits upon which the Judge's order to hold to bail is made, it should be to set aside the order.

In *Sugars v. Concanen*, 5 M. & W. 80, A. D. 1839, the application was to the court, and the form of the rule *nisi* was to shew cause why the bail bond executed by the defendant should not be delivered up to be cancelled on his entering a common appearance, upon the ground of an irregularity in the copy of the capias served, which stated the writ to be returnable within

four calendar months instead of one; but the rule was discharged, the court intimating that applications grounded on irregularities ought to be made within the time for putting in bail, which that application had not been.

In *Walker v. Lumb*, 9 Dowl. 131, A. D. 1840, the application was to the Practice Court and the rule *nisi* was to set aside the Judge's order for arresting the defendant upon affidavits meeting the affidavit upon which the order had been granted as to the intention of the defendant to leave the kingdom, and denying that he had any such intention, and shewing that he had applied monies realised from a sale of goods towards payment of his creditors. That was held to be an application on the merits and not for irregularity, and that therefore the application was not too late, although made after the expiration of the time for putting in bail. The case of *Sugars v. Concanen* upon points of irregularity was approved, and the court adopted the language of Mr. Lush in his practice, viz., that "when the complaint is founded on an irregularity, the application must, as before, be made within the time allowed for putting in bail, and before any fresh step with regard to these proceedings has been taken, but where it is founded on a material defect in, or, as it would seem, on the falsity of the affidavit, the defendant may perhaps apply at any time while the suit is pending." The rule in that case was made absolute, because the order had been granted on the ground of an assertion attributed to the plaintiff, to the effect that he intended leaving the kingdom when he should sell certain machinery, and the defendant upon affidavit fully met this, not only denying that he had any intention of leaving the kingdom, but shewing that he had sold the goods, and had applied the proceeds in paying his creditors, and the plaintiff offered no affidavits in reply to this affidavit.

In *Schletter v. Cohen*, 7 M. & W. 389, A. D. 1841, the application was to rescind an order of Rolfe, B., directing the issue of a capias for arrest of defendant, upon the ground of an alleged defect in the affidavit to hold to bail, viz., that the affidavit which was made before the suing out of a writ of summons was not entitled in the cause, but the court held this to be no defect.

In *Needham v. Bristowe*, 4 M. & Gr. 262, A. D. 1842, the application was to the full court, having been referred there by Wightman, J. from Chambers, but for what reason does not appear. The form of the rule *nisi* was to shew cause why an order made by Lord Denman, C. J., at Chambers, dated 15th March, for holding the defendant to bail, should not be set aside, why the writ of capias issued in pursuance of the same should not be set aside for irregularity, and why the bail bond given should not be given up to be cancelled. The irregularity complained of in the capias was in the endorsement thereon, which was issued by the plaintiff in person; wherein he described himself as "of the Fleet Prison in the parish of St. Bride in the city of London." It was held that this was no irregularity, so that the objection to the capias failed. The decision in effect was, that as to setting aside the Judge's order, the application was in the nature of an appeal, and that the court could give no judg-

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ment upon that point in favor of the applicant, as he had failed to bring before the court the materials used in Chambers upon which that order had been made; but as to setting aside the bail bond the application might be entertained under the 6th section of the Act, as a motion to discharge the prisoner. Tindal, C. J., says, "although the defendant in this case may not be in a condition to set aside the order, he may be entitled to insist on his discharge under the 6th section of the Imprisonment for Debt Act, (1 & 2 Vic. c. 110). *The proper form of the rule in that case would be to call on the plaintiff to shew cause why the defendant should not be discharged out of custody or why the bail bond should not be delivered up to be cancelled; but we can decide that now.*" To this counsel replied, "the only authority the court has under that section, is to discharge the defendant out of custody, but there is no such application in this case." To which Tindal, C. J., replied, that he thought the rule might be made absolute for *cancelling* the bail bond, on the merits disclosed in affidavits.

In *Gibbons v. Spalding*, 11 M. & W. 173, A. D. 1843, it was decided by the full court that an order for the arrest of defendant under 1 & 2 Vic. ch. 110 sec. 3, may be made on an affidavit of the plaintiff *that he has been informed and believes that the defendant is about to leave England*, provided it state the name and description of the person from whom he received such information. Parke, B., says, "it is every day's practice to make orders on such evidence. There is, however," he says, "this limitation to hear-say evidence, that no judge ought to make an order of this description merely upon the plaintiff's swearing that he is informed and believes that the defendant is about to leave the country. The plaintiff should be required to state in his affidavit the name of the person giving him that information. The Judge then has before him information which the defendant has the means afterwards of explaining or denying, and if he can do so he will be of course discharged." In that case B. Gurney, had made the order for holding the defendant to bail. An application was subsequently made to him in Chambers under and in the terms of the 6th section of the Act "*for the discharge of the defendant,*" but that summons was discharged. The application to the court was for a rule to rescind the above orders on the ground of the insufficiency of the affidavit upon which the order to hold to bail was made. The rule *nisi* was refused upon this ground, but was granted on the merits appearing in affidavits filed in Chambers upon the application *for the discharge of the defendant*. The form of the rule would seem to have been to shew cause why the defendant should not be discharged, and the order in Chambers refusing that discharge rescinded. Fresh affidavits, which had not been used in Chambers upon that application, being offered on behalf of the plaintiff on shewing cause to the rule, Thesiger interposed, and contended that fresh affidavits could not be read, "inasmuch as the present application was merely in the nature of an appeal from the decision of the learned Judge under the 6th section of the Act," but the Attorney General, *contra*, insisted that the admission

of fresh affidavits was altogether for the discretion of the court: that they might have been used "*if the defendant had applied to the court instead to a Judge at Chambers for his discharge, and therefore that they would properly be admitted in the present case;*" and Parke, B., says "the party who seeks to detain the defendant in custody is certainly at liberty to use other affidavits than those which were brought under the consideration of the Judge;" and Alderson, B., says, "I entertain no doubt that both parties are at liberty to use fresh affidavits. The object of the court must be to ascertain all the facts correctly, that they may determine on satisfactory grounds whether the Judge's order is to be set aside or not."

In *Heath v. Nesbitt*, 2 Dowl. N. S. 1041, A. D. 1843, the form of the rule was to shew cause why two orders of Gurney, B., one directing defendant's arrest under 1 and 2 Vic. ch. 110, and the other refusing his discharge, *should not be rescinded, and the defendant discharged out of custody*. The rule had been obtained upon fresh affidavits, and those which had been used in Chambers in support of the application for the defendant's discharge were not brought before the court. Hereupon Watson contended that "as the present application was in the nature of an appeal from the decision of the Judge, the affidavits used before him should be brought before the court, in order that they might see whether or no the Judge's discretion had been properly exercised," and it was held by the whole court, consisting of Lord Abinger, C. B., Parke, Gurney and Rolfe, B.B., that although additional affidavits may be used (as decided in *Gibbons v. Spalding*), still that those upon which the learned judge *refused to discharge* the defendant should also be before the court, for otherwise it would be impossible to determine whether he had decided correctly or not in *refusing the discharge*.

In *Graham v. Sandrinelli*, 16 M. & W. 191, A. D. 1846, the form of the rule which was granted by the court was simply to *show cause why the defendant should not be discharged out of the custody of the sheriffs of Middlesex*. The defendant had been arrested by an order of Erle, J. Upon being arrested the defendant on affidavits of himself and other persons that he intended to remain in England, applied to Platt, B. to set aside the order of Erle, J., and all subsequent proceedings. The learned Judge refused to make any order, whereupon the application was made to the court as above, and was supported by further affidavits besides those used in Chambers. Martin, in showing cause to the rule, contended that it was incorrect in point of form; that it ought to have been a rule to set aside the order of Platt, B., not merely a rule to discharge the defendant; that under section 6 of the Act, the proper course was for the party arrested to apply in the first instance to a judge, or to the court, for an order or rule on the plaintiff to shew cause why he should not be discharged out of custody; that in substance that was the application made to Platt, B., who in effect made an order refusing to discharge the defendant, and that then the subsequent jurisdiction of the court is only to discharge or vary such order made by a judge, on application made to the court by a party dissatisfied with

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the order; that the defendant, according to the true construction of the 6th section, can appeal at once; that he may under that section apply to another Judge, or he may come to the court at once, but that he cannot do both. On the other hand it was contended that wherever authority is given to a judge at chambers, it is impliedly given subject to the exercise of it being reviewed by the court, and that the court out of which process issued had always a right by virtue of their general jurisdiction, to relieve the party against it, if they thought the judge had allowed the process to issue upon insufficient materials, or had exercised an improper discretion in doing so.

In giving the judgment of the court, Parke, B. says, "It is clear from the terms of this (6th) section that notwithstanding the judge's order to arrest, the court from which the process issued, upon an application to it, has a power to discharge; and we think there is nothing in the Act to take away the general control previously possessed by the court over a single judge, if we think the materials before the judge insufficient, or that he exercised an improper discretion acting in any matters pending in the court; and consequently where an application is made to us, we may interfere, either by virtue of our general jurisdiction, or that given by the statute; and further, the party arrested may, by the statute, use affidavits to contradict or explain those on which the order was granted, either by denying the intention to depart, or shewing that the debt was not due, a course which was not permitted by the old practice of the court; and those affidavits may be answered by the plaintiff on shewing cause. *In addition to this*, a right is given to the person arrested to take the opinion of another judge *as to the propriety of his discharge*, this opinion being again subject to be reviewed by the court above."

He proceeds to say: "Two questions here arise—first, whether, if the judge secondly applied to should differ from the first on the same state of facts, he has power or right to order the prisoner's discharge as upon an appeal to the court; and, secondly, whether, if it should appear on the fresh affidavits that the person arrested was about to quit England at the time the affidavits were made, though it is not clear that he was, or even though it be shewn that he was not, when the order was made, the court ought to discharge him or his bail, or direct money deposited instead of bail to be refunded. *We are not all agreed upon the questions*, and it is not now necessary for us to decide them, though the points are of practical importance." With reference to the proceedings before Platt, B., the judgment proceeds: "After the defendant was arrested, he applied to my brother Platt to set aside the order to hold to bail, and all subsequent proceedings, upon his own affidavit and the affidavits of other persons as to his intention to remain in England. The learned judge refused to make the order. The affidavits did not disclose any new matter against the defendant. *In the form in which the summons was taken out*, my brother Platt was certainly right in not granting an order to the full extent asked, because the writ of *ca. ss.* certainly ought not to have been set aside. Whether he was right or not in re-

fusing to make an order to discharge only, on this summons, is not material now, for we are all of opinion that we may consider that my brother Erle's order and the affidavit in support of it are before the court, and that under our general jurisdiction we have a power to give the defendant relief. We all think he was wrong in making the order to arrest upon such an affidavit. The order, therefore, having proceeded on insufficient grounds, we think that the defendant should be discharged out of custody, and we may say *nothing respecting the order of Baron Platt*." The defect in the affidavit was that the plaintiff swore that he was informed and believed that the defendant was about to leave England without stating from whom the deponent obtained the information.

Talbot v. Bulkeley, 16 M. & W. 193, was before the court at the same time as *Graham v. Sandrinelli*. The rule was to shew cause why an order of Pollock, C.B., dated 11th August, 1846, should not be rescinded, and why the capias issued in pursuance thereof should not be set aside, and why the sum of £128 18s., deposited by the defendant with the Sheriff of Middlesex in lieu of special bail, should not be returned. The affidavit upon which the order for defendant's arrest had been made was objectionable upon the same ground as that in *Graham v. Sandrinelli*. After defendant's arrest he applied to the Chief Baron for his discharge, upon an affidavit negating his intention to leave England. His Lordship refused to make any order, and thereupon the defendant lodged £128 18s. in lieu of special bail.

On the part of the plaintiff, in answer to the rule, it was sworn that on the 7th November, the deponent called at defendant's lodgings, and was informed by a female servant there that his goods had been distrained upon for rent on the 20th October, and that on that day he had given up his apartments, and left for the purpose of going to France, and had never been there since that time. It was contended upon this affidavit that it shewed sufficiently reasonable ground to apprehend that the defendant would go abroad and defeat the plaintiff of his debt if he should be relieved from the effect of the Lord Chief Baron's order, or indeed that he had already gone, and that, this being so, the court would not set the order aside, or direct a return of the deposit. It was contended in answer that the original affidavit upon which the arrest took place was clearly insufficient, and that therefore the question was, whether it sufficiently appeared that, *when the defendant was arrested*, he had any intention of going abroad, that at all events the question must be determined with reference to the period when the original order was confirmed by the Chief Baron on the 17th August, and that subsequent facts ought not to be taken into consideration except in so far as they might show that the defendant at that time intended to go abroad. In reply to this contention Rolfe, B., says:—"I very much doubt whether the question is whether he intended to go abroad at the time of the actual arrest. The Judge may issue a capias at any time during the progress *totius quoties*, and if the court be satisfied that the defendant now intends to go abroad, it would be

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absurd to discharge this order, merely to substitute another of the present date," and in giving judgment the court say, "We have carefully perused all the affidavits, and think that if it were not for the matter disclosed on the affidavits used on shewing cause, the defendant would be entitled to have the deposit returned, but those affidavits raise a question on which the defendant has not had any opportunity of being heard, viz., whether he has not since the arrest, broken up his establishment and gone to reside abroad, and whether this be the fact the court wish to ascertain, before they decide on the question, whether the deposit ought to be returned," and that question was therefore referred to the Master.

In *Pegler v. Hislop*, 1 Ex. 437, A. D. 1847, the form of the rule was to shew cause why an order of Williams, J. for the arrest of the defendant, and under which he had been arrested, and had given bail to the sheriff, should not be rescinded, and why the bail bond should not be given up to be cancelled. The affidavits in support of the rule denied the existence of the debt, and also that the defendant was about to quit England for a period of two months. It being objected that the question of the existence of the debt could not be gone into, and that the only point open was as to the intention of the defendant to quit England, Parke, B., says:—"I think the words of the statute leave the whole matter at large, and the defendant is not precluded from disputing, at this stage of the proceedings, either the cause of action or other matters which the plaintiff's affidavits contain. It must, however, be a very clear case that the plaintiff had no cause of action, or we should not interfere." The decision in the case was, that as the court was of opinion that the intention of the defendant to go abroad was not made out, *the bail bond should be cancelled*, but the judge's order and the *capias* were undisturbed. That was a decision of the full court, consisting of Pollock, C.B., and Parke, Alderson and Rolfe, B.B.

In *Burness v. Guiranovich*, 4 Ex. 520, A. D. 1849, Lush obtained a rule in full court, calling upon the defendant to shew cause why so much of an order of Talfourd, J., of the 15th September, as set aside a former order made by the same learned Judge on the 1st of September, should not be rescinded. On the 1st September, an order had been made for the arrest of the defendant. After the arrest a further application was made to the same Judge upon additional facts, and he made the order of the 15th September, as follows:—"I order that my order to hold the defendant to bail, dated the 1st day of September instant, and all subsequent proceedings, be set aside with costs to be taxed, and that the defendant be discharged out of the custody of the sheriff of the city and county of Bristol." On the argument it was contended that the judge, upon the occasion of the second order, had exercised his discretion in a matter which was proper for his discretion, and that the court ought not, therefore, to interfere by setting the second order aside. To this, Parke, B. says:—"The defendant still may have his remedy by an action on the case," and Alderson, B. says:—"The statute (1 & 2 Vic. ch. 110) says nothing

about setting aside the writ: the proper course is to order the discharge of the party out of custody. The order of the learned Judge cannot be revoked. Can the defendant show any instance of such an order being revoked?" The learned Baron here plainly refers to the first order as the one which was revoked, but which he considered could not be. Counsel replied that "where an order has been obtained by fraud, the learned Judge may revoke it by reason of his general jurisdiction *quia improvide emanavit*," to which Alderson, B., answers, "As long as the order exists, the person who obtained it is not a trespasser. If the party has obtained the order by fraud, the other party has a remedy against him by an action upon the case," and the judgment of the court is given in these words, "*the proper course was to apply to discharge the defendant out of custody*. The rule must be made absolute to set aside the order of the 15th September so far as it relates to rescinding the order of the 1st of September."

In *Cunliffe v. Maltass*, 7 C. B. 695, A. D. 1849, an order to hold the defendant to bail in the sum of £1,050 had been made by Patteson, J. Upon the defendant being arrested, he applied to the same Judge under the 6th section of the Act, and obtained a summons calling upon the plaintiff to shew cause why he should not be discharged out of custody, upon the ground that the affidavit to hold to bail, which stated several causes of action, was defective as to the statement of one for £500, which, however constituted part of the £1,050. The learned Judge being of opinion that this cause of action for £500 was defectively stated, declined to discharge the defendant, but made an order reducing the amount for which the defendant should be held to bail to £550. The defendant afterwards perfected special bail for the lesser amount, namely, \$550, and applied to the full court for, and obtained a rule calling upon the plaintiff to shew cause why the two orders of Patteson J., should not be rescinded, why the writ of *capias* issued in pursuance of the first order should not be set aside, and why the recognizance of the defendant's special bail put in and perfected, should not be vacated, or why an *exoneratur* should not be entered on the bail piece on the defendant's entering a common appearance. Wilde, C. J., in giving judgment in that case, after stating the facts, including the application made by defendant for his discharge after arrest, says:—"I apprehend that the defendant is not now in a situation to make an application different from that which he made before the Judge at Chambers. The motion is founded on the 6th section of the statute, which enacts that 'it shall be lawful for any person arrested upon any such writ of *capias* to apply at any time after such arrest to a judge of one of the superior courts at Westminster, or to the court in which the action shall have commenced, for an order or rule on the plaintiff in such action to shew cause why the persons arrested should not be discharged out of custody; and it shall be lawful for such judge or court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such order therein as to such judge or court shall seem fit, provided that

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any such order made by a judge may be discharged or varied by the court, on application made thereto by either party dissatisfied with such order.' When, therefore, the parties come before the court, the court is to make such order as it conceives the justice of the case to require. Now, justice requires that we should deal with the case as it was presented before the judge." Coltman, J., says:—"By the 3rd section of the Act, two matters are referred to the Judge—the one, whether the plaintiff has a cause of action against the defendant to the amount of £20, or has sustained damage to that amount; the other, whether there is probable cause for believing that the defendant is about to quit England. When the judge makes an order to hold the defendant to bail for a particular amount, *he is doing a judicial act*. The question is, what is the mode of relief where the judge has directed a defendant to be held to bail for a larger sum than is warranted by the affidavit? The remedy is pointed out by the 6th section, which provides that *any order made by a Judge may be discharged or varied by the court on application made thereto*.

In *Gadden v. McLean*, 9 C. B. 283, A. D. 1850, the application was to the full court, and the form of this rule was to shew cause why the Judge's order to hold the defendant to bail, and the *capias* issued in pursuance thereof should not be set aside, and why the bail bond should not be delivered up to be cancelled on the ground that the affidavit to hold to bail disclosed no cause of action. Wilde, C. J., in giving judgment says:—"The court is of opinion that the affidavit upon which the order for the *capias* in this case issued, does not disclose any good cause of action. Upon the whole we think that remedy enough will be given to the defendant by ordering the bail bond to be delivered up to be cancelled without costs."

In *Bullock v. Jenkins*, 20 L. J. Q. B. 90, A. D. 1850, the application was to the Bail Court, and the form of the rule was to shew cause why an order of Platt, B. to hold the defendant to bail, should not be rescinded, or why the defendant should not be discharged out of custody. After having been arrested, the defendant upon affidavits that he had no intention of leaving the country, applied to Platt, B. for his discharge. His Lordship dismissed that application, but made an order reducing the amount of the bail. It was contended that the defendant, having applied to Platt, B. for his discharge, was not entitled to come to the court by way of appeal from his decision. Patteson, J., in giving judgment, says:—"The application is divided into two parts; the granting or refusing the first part must depend upon whether the order was rightly made in the first instance, and that again will depend upon whether the affidavit upon which it was founded was sufficient to justify the learned judge in making the order. I take it to be quite clear, that on a motion to set aside an order of a judge warranting the arrest of a party, it is not competent for the party making the application to produce affidavits as to collateral facts not submitted to the notice of the judge. In considering, then, whether the order of Platt, B. ought to be set aside I must confine myself to looking at the affidavit on which the

order was made." After reviewing the affidavit the first part of the rule was discharged. He then proceeds:—"Then as to the second part of the application, which is for the discharge of the defendant out of custody, it appears that an *application to discharge the defendant* had been made to the learned judge, but that the latter had refused it. It is competent nevertheless for the defendant to come to this court and ask for his discharge. The application is not by way of appeal, but is a substantive application, and therefore new facts may be introduced." Now this case seems to warrant the conclusion that the application to a judge which the 6th section of the Act authorises to be made *after the arrest*, is not by way of appeal from the order authorising the arrest. It may be made to the same Judge as the one who ordered the arrest, or to any other judge, and if by way of appeal no new matter could be introduced; and moreover the decision of the judge made under the 6th section, does not exclude an *appeal to the court* against the *first* order to hold to bail, without taking any notice of the order of the judge to whom the application had been made after the arrest.

In *Hargreaves v. Hayes*, 5 El. & B. 272, the application was to the full court, and the form of the rule asked was to set aside the order of Erle, J., directing the defendant to be held to bail. The grounds of the motion were alleged defects in the affidavit to hold to bail. The court there sustained the order, notwithstanding the objections, and refused to grant a rule, holding that the affidavit to hold to bail was sufficient, which alleged that the defendant was indebted to the plaintiff in a stated sum for railway shares *sold* by the deponent to him without adding *and delivered*, and that the entitling the affidavit in a court, and with a style of cause, although made before writ of summons issued, did not vitiate the affidavit.

In *Stammers v. Hughes*, 18 C. B. 527, A. D. 1856, the plaintiff had most grossly imposed upon a Judge by swearing that the defendant was indebted to him in £83, and had thereby obtained an order to hold the defendant to bail, and, upon arrest, the defendant being about to sail for America, deposited with the sheriff the full amount of the alleged debt. Afterwards upon affidavits denying the existence of the debt, and shewing the contract, by which it appeared that no debt or claim did or could be alleged to exist against the defendant, and although the plaintiff's claim was so utterly devoid of foundation as to induce the learned judge to characterise the conduct in swearing to the debt, and thereby obtaining the order for arrest and the *capias*, as a gross abuse of the process of the court, and another learned judge to say that he had no hesitation in saying "that the plaintiff had not a shadow of claim," and another that "the plaintiff's claim is wholly unfounded," still the form of the rule was merely calling upon the plaintiff to shew cause *why the money deposited with the sheriff should not be restored to the defendant*.

In *Stein v. Valkenhuyzen*, El. Bl. & El. 65, A. D. 1858, the form of the rule is not precisely stated, but as the whole proceeding was a gross abuse of the process of the court, the order, *capias* and arrest, all appear to have been set aside.

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In *Burns v. Chapman*, 5 C. B. N. S. 481, an order to hold the defendant to bail was made by Hill, J., on the 8th October, 1858. After the defendant was arrested under a *capias* issued upon that order, and had deposited the amount sworn to with the sheriff, and £10 in lieu of bail, he made an application upon affidavits to the same Judge for and obtained a summons, the form of which, as appears by the report, was, calling upon the plaintiff to shew cause why the order of the 8th October should not be rescinded. The summons was opposed upon affidavits, and the learned judge refused to make any order, but whether he so refused for the reason of the form of the summons, or on the merits, does not appear. On the first day of the following term a motion was made to the court for a rule to shew cause why the order of the 8th October should not be rescinded, and the writ of *capias* issued thereunder set aside, and why the money paid in lieu of bail should not be repaid to the defendant. The rule was moved upon two grounds: first, that the affidavit upon which the order for the writ of *capias* was obtained contained a statement of a cause of action, which, when the circumstances came to be investigated, the plaintiff could not sustain; secondly, that the Court of Common Bench had no jurisdiction over the subject matter of the action. The court refused to grant any rule. As to the first point, Cockburn, C. J., giving judgment, says:—"All that is required under the statute, 1 & 2 Vic. ch. 110, is, that the Judge should be satisfied, that there is a cause of action. I entertain a strong opinion, that if the judge be satisfied that a cause of action exists, it is not for him to enquire into the particular form of the action; and even if it should appear to him that the plaintiff is about to pursue a mistaken or erroneous course of proceedings, I think it is no part of the Judge's duty to entertain that question. If satisfied that the plaintiff has a cause of action, all he has to do is to afford him the remedy pointed out by the statute. Of course the court will not stand by and see its process abused. It was upon that principle that this court proceeded in *Stammers v. Hughes*. Being satisfied that there was no cause of action at all, and that its process was being abused for the purpose of oppressing and harassing the defendant, the court thought fit to interfere for her protection. So, here, if the court were satisfied that this action was causelessly brought, and the arrest of the defendant vexatious, and an abuse of its process, it would not be slow to interfere to prevent injustice," and Williams, J., says:—"I entirely concur in what has fallen from my Lord. All I wish to add is, that in refusing this rule we are not in any degree departing from the principle upon which this court acted in *Stammers v. Hughes*. The court will not interfere unless it clearly appears that the plaintiff has no good cause of action, and that he is using the process of the court for the purpose of oppression and annoyance."

In *Barker v. Lingholt*, 11 W. R. Q. B. 68, it appeared that on the 23rd September, 1862, the defendant had been arrested. On the 26th September, defendant applied to Bramwell, B., upon affidavits, for his discharge. The learned Baron refused to discharge the defendant. On

October 23rd, he again applied for his discharge to Mellor, J., upon a further affidavit. Upon this application the learned Judge discharged defendant, but the plaintiff forthwith obtained from him another order for defendant's arrest, founded upon another affidavit. The defendant being again arrested, applied for his discharge to the court in term, upon affidavits setting forth all the above proceedings. The application was made partly on the ground of the double arrest, and partly on account of inconsistency in the affidavits and their unsatisfactory character. The defendant in his affidavits denied the cause of action, and it was contended for him that he could controvert the debt, and that the court or a judge has a discretion on the whole of the circumstances. To this, Cockburn, C. J., says:—

"Not a general discretion—supposing a *prima facie* case is made on which the judge or the court is satisfied that there is a cause of action, that is, a real *bond fide* question to be tried. No doubt if it be clear that there is not, then he cannot be satisfied that there is a cause of action so far as to allow of the arrest. In giving judgment, he says: "The cause of action must no doubt be shewn to the satisfaction of the judge, but it is so shewn when it is sworn to in an affidavit of the plaintiff, and there are only, on the other side, affidavits which leave the question in doubt. That is so here. It is left doubtful by the defendant whether there is or is not a cause of action [the question depended upon what the foreign law was, which governed the case, as to which there was no clear evidence], but it is positively sworn to by the plaintiff. There is not enough to shew any wilful abuse of the process of the court, or any wilful falsehood in the affidavits." The court refused to discharge the prisoner, but the defendant's counsel being satisfied with the reduction of the amount of bail, and the plaintiff not resisting, the rule was made for reduction of bail.

In *Delisle v. Legrand*, 6 U. C. L. J. 12, before Draper, C. J., in Chambers, the form of the summons was to set aside the order of the County Judge of the county of Essex for defendant's arrest, and the writ of *capias*, with costs, and to discharge defendants from custody, on the ground that the affidavit to hold to bail was insufficient, inasmuch as the plaintiff had no cause of action to the amount of £25, and because the facts and circumstances to satisfy the judge that there was good and probable cause to believe that the defendants, unless forthwith apprehended, were about to leave Canada with intent to defraud the plaintiffs, were untrue. The learned Chief Justice upon the authority of *Stammers v. Hughes*, 18 C. B. 52, entertained the question as to the existence of the debt, and the intention to quit Canada with intent, &c., upon affidavits filed by defendants and others filed in answer thereto, and, notwithstanding the form of the summons nothing in fact turned upon any defect or insufficiency in the affidavits to hold to bail, but the case proceeded wholly upon new matter, and the summons was discharged.

In *Terry v. Comstock*, 6 U. C. L. J. 235, before Draper, C. J., the summons called upon the plaintiff to shew cause why the writ of *capias* issued in the cause, the arrest of the defendant thereunder, and all proceedings subsequent

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thereto, should not be set aside, on the ground that both the plaintiff and defendant were at the time of the issue of the writ citizens of a foreign country; or why the arrest should not be set aside, and the defendant altogether discharged from custody, on the ground that the defendant had not, either at the time of the making of the affidavit to arrest, the issue of the writ of *capias* thereon, or the arrest of the defendant thereunder, any intention to quit Canada, with intent to defraud his creditors generally, or the plaintiff in particular, or for any other purpose. Draper, C. J., in giving judgment, says:—"In this application to set aside the defendant's arrest and discharge him from custody, the only point for decision raised is, that the defendant had not at the time of the granting the order, the issuing of the *capias*, or the making of the arrest, any intention of quitting the Province of Canada with intent to defraud. *It was not pressed upon me to review the decision of the learned Judge who made the order for the arrest, upon any suggestion of the insufficiency of the affidavit before him to sustain such an order. The application was based entirely on the new matter disclosed upon affidavits. Had the former course been taken I should have referred the matter to the full court.*"

In *McInnes v. Macklin*, 6 U. C. L. J. 14, the application was by summons to shew cause why the defendant should not be discharged from custody and the bail bond be cancelled "on the ground that the affidavit on which the order had been obtained did not disclose the name of the party from whom the plaintiff received the information that defendant was going to New Caledonia, and upon grounds disclosed in affidavits and papers filed." These affidavits, which were very numerous, were offered for the purpose of shewing the dealings between the parties, and that, although defendant was going from Canada, it was but for a short time on business, and that he was leaving his family here, and negating all intention to defraud. Hagarty, J., after referring to these affidavits, and to *Graham v. Sandrinelli*, and the points there stated as undecided, says:—"It is not necessary further to discuss the question of my jurisdiction in Chambers, as I dispose of this case upon my view of the merits."

In *Swift v. Jones*, 6 U. C. L. J. 63, the application was in Chambers for a summons to shew cause why the order of the Judge of the County Court of the County of Brant, the writ of *capias* issued thereon, the copy and service thereof, and the arrest of the defendant under the said writ, should not be set aside with costs, for (among several grounds stated,) the following, which was the only one held to be tenable, namely—that the writ was issued out of the Court of Common Pleas, and one of the affidavits on which it was issued was entitled in the Court of Queen's Bench. Richards, J., giving judgment in that case, says:—"The case cited from 5 E. & B. 272 (*Hargreaves v. Hayes*) seems to me to be a strong one in favor of the plaintiff, and there would always be great reluctance to set aside the order of a judge directing the arrest, when there are strong grounds from which he might draw the conclusion that the defendant was about to leave the Province of Canada. At all events I am not prepared, even if I had the authority so to do, to set aside the arrest on the

ground that the learned Judge of the County Court ought not to have ordered it, from the insufficiency of the affidavits placed before him." The learned Judge, however, was of opinion that the not having the head of "In the Queen's Bench" erased when the affidavit was filed in the Common Pleas, and the title of the Court of Common Pleas inserted, was the act of the plaintiff and an irregularity, and for that reason he set aside the arrest. He says:—"One of the affidavits here is entitled in the Court of Queen's Bench and the other is not entitled at all. It may be argued that the affidavit might now be entitled, which has a blank for that purpose; but that would not get over the difficulty as to the other, and both affidavits are necessary to justify the arrest. I have seen no case which goes so far as to decide that a plaintiff is not guilty of an irregularity when he entitles his affidavit in one court, and uses it in another. I think, independently of the question of irregularity in using the affidavit entitled in one court for the purpose of issuing bailable process out of another, that our statute was intended to provide expressly for the mode in which affidavits to hold to bail were to be sworn and entitled when used in either of the courts. The plaintiff, not having followed that course, is, I think, clearly irregular in his proceeding." I would infer from the same learned judge's decision in *Molloy v. Shaw*, 6 C. L. J. N.S. 294, that he would not have made use of his language if *Ellerby v. Walton*, 2 Prac. Rep. 147, which was a decision of the full court, had been cited, and which in *Molloy v. Shaw* he followed. It is singular that neither in *Swift v. Jones* nor in *Allman et ux. v. Kensel*, 3 Prac. Rep. 110, nor in *Palmer v. Rodgers*, 6 U. C. L. J. 188, was *Ellerby v. Walton* cited.

In *Allman et ux. v. Kensel*, the application was in Chambers to set aside the order for the defendant's arrest made by the County Judge of Essex, with the writ and arrest, on various grounds, viz., the insufficiency of statement of any good cause of action, and the absence of any facts indicative of an immediate departure from Canada, the absence of any heading to the affidavit shewing what court it was in, and other minor grounds. Hagarty, J., following *Swift v. Jones*, set aside the arrest upon the ground of irregularity in the title of the court not having been inserted in the affidavit when it was filed on process issuing, but he adds, after referring to *Terry v. Comstock* and *McInnes v. Macklin*, "I desire to be understood as expressing no opinion as to my right to review the County Court Judge's decision in a case like the present."

In *Palmer v. Rodgers*, 6 U. C. L. J. 188, the form of the summons was to shew cause why the defendant should not be discharged from custody, and the order to hold to bail, the *capias*, the arrest of the defendant thereunder, and subsequent proceedings had thereon, set aside upon several grounds, among which was the following:—"4th. Because there was not at the time of making such affidavit to hold to bail or said order, or the issuing of such writ of *capias*, a good and probable cause for the plaintiff believing that the defendant unless he should be forthwith apprehended was about to quit Canada

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with intent to defraud his creditors generally or the plaintiff in particular." As to this objection, Richards, J., disposes of it by saying:—"I am uncertain whether I ought to set aside the arrest on this ground or not. I have doubts as to the propriety of doing so, and stronger doubts as to my authority as a Judge in Chambers to do so."

In *McGuffin v. Oline*, 4 Prae. Rep. 185, the summons was to shew cause why a County Court Judge's order to hold to bail in a superior court action, and the arrest, &c., should not be set aside, on the ground that the affidavit was insufficient, that the reasons assigned for the plaintiff's belief were insufficient, untrue and unfounded, because defendant was not about to quit Canada, &c., or why the amount for which defendant was held to bail should not be reduced to \$500. Many affidavits were filed on both sides on the merits. Hagarty, J., giving judgment, says:—"I at once say that I should not have ordered the defendant's arrest on such an affidavit as seems to have satisfied the County Judge. But I have several times had occasion to express my difficulty in assuming the right to review the exercise of the Judge's discretion in a matter clearly within his jurisdiction. I draw," he says, "a broad distinction between the case of an order based on affidavits clearly deficient in certain statutable requirements, and those which state facts from which differently constituted minds may in good faith draw different conclusions. I think I should await the positive judgment of the court in *banc* before taking on myself to set aside a Judge's order, merely because the statements on which it was granted failed to bring my mind to the same conclusion as that of my fellow Judge," and in support of this view he refers to *Howland v. Rowe*, a case under the Absconding Debtor's Act before himself in Chambers, and in the Queen's Bench in 25 U. C. Q. B. 467.

The two questions stated in *Graham v. Sandrinelli*, in respect of which the court were not agreed, and therefore gave no decision, do not appear, so far as I have been able to discover, ever yet to have received judicial solution.

The clauses of our Act, 22 Vic., ch. 96, which are consolidated in the Consolidated Statutes of Upper Canada, ch. 22 sec. 31, and ch. 24 sec. 4, are in substance identical with the clauses of the Imperial Act, 1 and 2 Vic. ch. 110, so that the decisions under that Act are express decisions governing the cases arising under our Acts.

With a view to enable the parties in these two cases, one of which is in the Queen's Bench, and the other in the Common Pleas, to bring the matters before the courts if so advised, I have perused all the cases I have been able to find upon the subject, and I have thought it best to enter at large into the question, and to state explicitly the opinion which I have formed. The point involved is one of great importance, and one which should not be permitted to remain any longer in doubt.

Arrest upon civil process since the passing of 22 Vic. ch. 96 is no longer the act of the suitor as it was formerly—the order authorising the issue of the writ of *caapias*, the writ issued thereunder, and the arrest made in virtue of such

writ, are all judicial acts, deliberately sanctioned by the decision of a Judge satisfied of the existence of a cause of action wherein a plaintiff has sustained damage, and of an intent on the part of the defendant of leaving the country with intent to defraud the plaintiff in particular or his creditors in general. The whole proceeding down to and including the arrest is judicial, except in so far as the arrest itself may be vitiated by any illegal or irregular procedure in the control of the party or his agents subsequent to obtaining the judicial order, but in that case the order and the writ, unless there be some defect in their form, still remain judicial acts. To the Judge to whom the application for an order to hold to bail is made, is confided by the Legislature the duty of *satisfying himself* of those matters which the law requires him to be satisfied of before he shall grant the order, as the sole condition of the making of the order. To his judicial mind are submitted all points, as well of form as of substance, which the law requires to be supplied before the order shall be made. The Legislature, I think, was well satisfied that this precaution afforded ample security that every requisite preliminary should be substantially complied with before an order for the arrest of a party should be made, and for any purely technical irregularity which may have escaped the observation of a Judge, or which he may have deemed to be too trifling to interfere with his making an order, it was never, as it appears to me, contemplated to be capable of being brought up before any other tribunal by way of appeal.

The Act providing that it was the mind of the Judge to whom the application was made that should be satisfied of the propriety of making an order authorising the issue of a *caapias*, the exercise of that Judge's judgment and discretion never could have been brought in question before another Judge sitting out of court for any suggested error in judgment without an express statutory provision giving such jurisdiction to a single Judge. The court in the general exercise of its jurisdiction over the acts of a single Judge sitting out of court could set aside the order without any statutory provision, but no single Judge sitting in Chambers could, in my opinion, exercise any such jurisdiction without express statutory provision. The arrest then of a party under a *caapias* issued upon an order made by a Judge (there being no intervening irregularity in the *procedure* between the issuing of the order, and the making the arrest) being a judicial act, and no longer the act of the party, it is not expedient that either the order, the *caapias*, or the arrest, should be *set aside* by another Judge for any suggested irregularity in point of form or insufficiency in point of substance in the material laid before the Judge as the foundation for the order. Any such irregularity or insufficiency must be regarded as the oversight of the Judge, and therefore after the order is acted upon, and the party arrested, that judicial act should be only called in question by a superior tribunal, which should exercise its jurisdiction in such a manner as not to make persons who acted in the arrest or applied for the order, trespassers by reason of any miscarriage of the Judge in grant-

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ing the order when in the judgment of the superior tribunal he should not have done so. A single Judge then having no jurisdiction, as it appears to me, over the judicial act of another Judge without statutory provision giving such jurisdiction, we have to look to the Act to see whether any such jurisdiction is given, and there we find that after the arrest a particular jurisdiction is given, which may be exercised by the Judge who granted the order, even by the Judge of a County Court who may have granted an order for arrest in a superior court case, or by any other Judge, or by the court out of which the process shall have issued upon the order; and the particular form in which this jurisdiction shall be exercised is defined, namely, by an order or rule on the plaintiff to show cause why the person arrested should not be discharged out of custody. This is the only form in which, as it seems to me, the jurisdiction given by the statute to a single Judge can be exercised. Doubtless an application may be made to a Judge to set aside the writ of *capias*, and also the arrest, for any irregularity or defect in the writ of *capias* itself or in the mode, time or place of effecting the arrest and for non-compliance with the rules of practice or procedure subsequent to the making of the order for the issue of the *capias*, but that would be an application to the general jurisdiction of the Judge in Chambers over procedure, and not an application under the special jurisdiction conferred by the Act; for such an application, it is plain, being upon a point of procedure independent of any judicial act, must be made according to the ordinary practice regulating procedure in causes pending in the superior courts, and could not be made to the Judge of a County Court, although the Judge who may have made the order for arrest. The application authorised by the Act to be made to the court or Judge after the arrest, is, as it seems to me, plainly an application founded on new matter for the purpose of shewing that the matters laid before the Judge upon the application for the order, (which was necessarily *ex parte*), are capable of clear explanation, or can be shown to have been either intentionally or through mistake misrepresented to the Judge. In such a case provision is made that upon both sides being heard, the court or a Judge to whom the application may be made, may discharge the prisoner from custody, leaving the judicial act which authorised the arrest to remain unaffected as a security to all parties engaged in the arrest; and in this respect a difference is made between the jurisdiction of the court and that of a Judge, for it is expressly provided that the court may discharge or vary the Judge's order. This being so expressed in the clause, the conclusion is irresistible that the Legislature had no intention that a single Judge should have power to discharge or set aside the order of another Judge, and the case of *Burness v. Guiranovich*, 4 Ex. 520, is conclusive upon this point. The observations also of the several learned Judges in *Needham v. Bristowe*, *Gibbons v. Spalding*, *Heath v. Nesbitt*, *Graham v. Sandrinelli*, *Pegler v. Hisslop*, *Cunliffe v. Maltass*, and *Bullock v. Jenkins*, lead, I think, to the same conclusion. The result, as it appears to me, upon a consideration of the Act itself, and to be deduced from a

comparison of all the cases, is, that the court out of which the process issues has general jurisdiction, independently of the statute, over the acts and decision of the Judge granting the order, to revoke the order, or to discharge the prisoner, proceeding upon the same identical material that was before the Judge. The court out of which the process issues, has, after the arrest, by the statute, concurrently with the Judge of any of the superior courts sitting in Chambers, and with the Judge of a County Court who may have made the order for the arrest in a superior court case, jurisdiction upon new matter to entertain the question whether upon both sides being heard, not the order itself authorising the arrest, but its effects, may be modified as justice may require, by an order for the discharge of the prisoner; and beyond this jurisdiction so given by the statute to a Judge co-ordinately with the court, the court has given it by the statute the superior jurisdiction proper to be entertained by the court, though not by a single Judge, that upon such application to discharge the prisoner being made to the court, it may discharge, if it thinks fit, the original order, the court, therefore, has its original jurisdiction over a Judge's order which it may exercise by appeal upon the original matter before the Judge without more; and it has also an express jurisdiction, by statute, enabling it to discharge the Judge's order, and it has, concurrently with the Judges of the Superior Courts singly in Chambers, and with the Judges of County Courts in the special case of an order for arrest in a superior court case made by such Judge, original jurisdiction to entertain the question of the discharge of the prisoner, upon the merits presented, upon both sides being heard. No appellate jurisdiction whatever, as it seems to me is given to a single Judge. It is hardly to be conceived that the Legislature contemplated giving to a County Court Judge in a superior court case, an appellate jurisdiction (merely upon the original materials) over his own order for arrest made in the case; and the jurisdiction which the statute gives to any single Judge is that given to a County Court Judge where he has himself made the order. When appellate jurisdiction is exercised, the judgment proceeds wholly upon the original material, which must be brought into the appellate tribunal. The court never acts as an appellate tribunal without compliance with that condition. Now the material laid before a Judge for an order for arrest is filed in the court out of which the process issues: when it issues, that material so filed can never be removed from the court to be transferred to a Judge in Chambers, but it is in the court itself to enable it to exercise jurisdiction over it as justice may seem to require, and this, as it seems to me, is what is meant by the observation of Baron Parke in giving the judgment of the court in *Graham v. Sandrinelli*, viz.: "but whether the learned Baron (Platt) was right or not in refusing to make an order to discharge only this summons, is not material now, for we are all of opinion that we may consider that my brother Erle's order (authorising the arrest) and the affidavits in support of it, are before the court, and that under our general jurisdiction we have

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power to give the defendant relief, and we all think he was wrong in making the order to arrest upon such an affidavit," and so the court ordered the prisoner to be discharged, but did not set aside the order or the *capias*.

Now in neither of the cases before me is the summons framed in the shape which, as it appears to me, is required by 22 Vic. ch. 22 sec. 31, although in both cases new affidavits are filed. The summonses in both cases call upon the plaintiffs respectively to show cause why the judicial act of the Judge making the order should not be set aside. This, as above stated, appears to me to be an error, and I shall not assume a jurisdiction which I think I have not, to set aside the Judge's order or the *capias* issued thereunder for any defect or insufficiency (if any there be) in the material upon which the Judge making the order in each case exercised his judicial functions, or for any other cause.

In *Damer v. Busby*, all the new matter introduced by affidavits was expressly waived and withheld from my consideration, the defendant electing to rest upon the alleged insufficiency of the material used before the Judge, and the variance between the copy of the *capias* and the original and the fact that neither affidavits or fiat are entitled in any court, in preference to the plaintiff obtaining an enlargement to meet the affidavits filed on defendant's behalf. With respect to this case, I wish to observe, however, that I am of opinion, that there is nothing whatever in the objections contained in the heads of objection in the summons above numbered 1, 5 and 6, and I have been authorised by C. J. Hagarty to say that he refused to grant the summons upon the suggestion of insufficiency in the statement of the debt, and that he was surprised to find his name to a summons involving that objection. *Ellerby v. Walton*, 2 Prac. Rep. 147, lately followed in *Molloy v. Shaw*, 6 C. L. J. N. S. 294, by Richards, C. J., is an answer to the 2nd, 3rd and 4th objections. It appears to me to be as much the duty of the Clerk of Process, (who alone can determine out of which court the process is to issue,) as it is of the plaintiff, to see that the affidavit is entitled in the proper court when filed on the process issuing, and I cannot see any good reason why he should not entitle the affidavit without any order, upon the omission being discovered. As to the order itself, when made, it could not be determined in what court to entitle it, nor does the statute say that it shall be entitled; and in the present case, being endorsed on the affidavits, I see no occasion for its having any separate title from that contained in the affidavit, when that is inserted. As to the 7th objection—the variance between the copy and the original *capias*, doubtless if the objection be sufficient, the arrest may be set aside, notwithstanding the opinion I have expressed as to my having no jurisdiction to review the decision of the Judge who granted the order upon the materials before him. In *Macdonald v. Mortlock*, 2 D. & L. 963, where a defendant was described in a *capias* as "Mortlock," and in the copy as "Mortlake," it was held that the copy might be amended. In a subsequent case, *Moore v. Magan*, 16 M. & W. 95, where the defendant was arrested under a *capias* addressed to the *Sheriffs* instead of the *Sheriff* of Middlesex, the

Court of Exchequer held that the writ itself might be amended, but that the copy could not. If I had to choose between these seemingly conflicting cases I should have no hesitation in adopting *Macdonald v. Mortlock*; but it is not necessary, for two reasons,—first, because both of these cases were before the C. L. P. Act, and are not, I apprehend, of much weight as limiting the powers of the court or a Judge as to amendments since the passing of that Act; and secondly, that assuming *Moore v. Magan* to be still a binding authority, it is sufficient for the purpose of the case before me, for the writ being amended to conform to the copy, all objection is removed, and indeed the copy is the more perfect of the two, as containing the Christian names of the plaintiffs instead of the initial letters of their names. I think that there is no doubt that both the Judge's order and the *capias* may in this respect be amended, to conform to the copy served. In *Folkard v. Fitzgubbs*, 1 F. & F. 376, Hill, J., refused to set aside a writ of summons and also a writ of *capias* upon the ground of irregularity in that the summons was wrongly tested, "Thomas Lord Campbell," and the *capias* "Thomas Lord Campbell, Knight."

The result therefore is, that in *Damer et al. v. Busby* the summons must be discharged, but I shall not give the plaintiff any costs, for I have no desire to countenance or encourage the carelessness displayed, both in the description of the residence of the deponent King in one of the affidavits, and in not taking the precaution of comparing the original *capias* with the copy before handing it to the sheriff for execution.

In *Black v. Wigle* the summons must also be discharged for the reason already stated, viz., that the frame of the summons asks that the judicial act of the Judge who made the order shall be set aside, and does not ask the relief indicated in the Statute, 22 Vic. ch. 22 sec. 31.

Had the frame of the summons been different, I should have held in this case that the plaintiff's affidavits in reply to defendant's, so displace in my judgment the substance of the latter, that I could not have discharged the prisoner upon the ground contained in these affidavits; and as to the objection that no cause of action is stated sufficiently, my objection to review the decision of the Judge who made the order would have been the same as it now is, even though the frame of the summons had been in the words of the Act, for the discharge of the prisoner from custody. The only case in which, as it seems to me, the Judge to whom an application to discharge the prisoner from custody is made under the provisions of the Act, upon the same material only as was before the Judge making the order, should assume the right of discharging the prisoner, would be the case of a manifest defect, appearing in the material necessary to be supplied to call the judicial function into action. For example, the statute, 22 Vic. ch. 24 sec. 5, requires that the causes upon or in respect of which a Judge may act, shall be presented to him upon affidavit. Now if a paper purporting to be an affidavit, containing abundant matter to warrant the making the order if the affidavit had been sworn, be presented to a Judge, but it in fact should contain no jurat, or no commissioner's or other person's name as having adminis-

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tered the oath, and this defect should escape the Judge's observation, and he should make the order, and after arrest the defendant should apply for his discharge for this defect,—in such a case it may be said that the jurisdiction of the Judge had not attached for want of an affidavit, and that therefore any Judge might properly discharge the prisoner from custody.

Between a cause of action not technically stated in an affidavit, and an affidavit shewing clearly that no cause of action does exist there seems to me to be a marked difference. As to the sufficiency of the statement of the cause of action in this case I express no opinion, but as the averment, the omission of which is insisted upon as vitiating the proceedings, seems supplied in some of the affidavits now filed, if the case should come up before the court, it will be necessary to consider the case of *Stammers v. Hughes* as explained and referred to in *Burns v. Chapman*, as also the case of *Barker v. Lingholt*, and the observations of Rolfe, B., in *Talbot v. Bulkeley*. The summons will be discharged without costs.

Both summonses discharged without costs.

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COMMON PLEAS.

BRODERICK AND ANOTHER V. SCALE.*

Sufficiency of affidavit under 17 & 18 Vict. c. 36 (Bills of Sale Act), as to description of witness.

A bill of sale was attested by one T. S., described as "clerk to W. F.," the affidavit required by the Bills of Sale Act was made by T. S., described as "gentleman." Held, that the affidavit was insufficient, and the bill of sale therefore void as against an execution creditor.

[19 W. R. 386.]

Interpleader issue.

The plaintiffs were grantees of a bill of sale. The defendant was an execution creditor. The bill of sale dated 6th of July, was attested by John Shaw, described as "clerk to William Flavell." The affidavit, dated the 21st of July, began with the words "I, John Shaw, &c., Gentleman," and concluded with the words, "I further say that the name or signature, J. Shaw, subscribed to the said indenture and bill of sale as the attesting witness to the execution thereof, is in my own handwriting, and that I am gentleman, &c."

The case was tried at the Surrey Summer Assizes, and a verdict found for the defendant, with leave reserved to move to enter it for the plaintiff if it should be considered that the affidavit complied with the provision of the statute 17 & 18 Vict. c. 36.

A rule nisi having been obtained,

Day, now (Jan. 11.) showed cause.—The affidavit is insufficient; the description of the witness is inconsistent with that given in the bill of sale; *Foulger v. Taylor*, 8 W. R. 279, 5 H. & N. 202; *Tuton v. Sanoner*, 6 W. R. 545, 27 L. J. Ex. 298; *Allen v. Thompson*, 4 W. R. 508, 1 H. & N. 15.

Ribton and Bromley, in support of the rule.

Jan. 12.—BOVILL, C. J.—I should be very desirous of supporting this bill of sale, as there was clearly no intention to deceive creditors, but the Act requires something definite—viz., the oath of the attesting witness as to his residence and occupation, and we have no power to dispense with this provision. Now, it has been considered that this description must apply to the time of the making of the bill of sale. The question, then, is whether such a description has been verified on oath. The description in the affidavit is in these words "I, John Shaw, Gentleman." In fact he was an attorney's clerk, and, therefore this description is incorrect. In some cases the affidavit has been considered sufficient where there has been clear reference to the description in the bill of sale, but here there is no such reference. The rule, must therefore, be discharged.

WILLIAMS, J.—I am of the same opinion. The case arises upon the validity of a bill of sale which a creditor has taken by way of security upon his debtor's goods, leaving the goods in the apparent possession of the debtor till another creditor comes with an execution, and then the bill is set up. The Legislature having had its attention called to cases of fraud occurring under such circumstances has imposed certain restrictions and conditions upon the making of such bills of sale, and in the event of such conditions not being complied with, a bill of sale is declared to be void. I take the language of the Legislature and put upon it a natural meaning, not dispensing with what it considers necessary, and agreeing with what Williams, J., said in *London and Westminster Discount Company v. Chace*, 10 W. R. 698, 31 L. J. C. P. 814. The last section enacts (His Lordship read 1st section of 17 & 18 Vict. c. 36).

The question, then, is whether the description there required was well given by the bill, and it was insisted that that was sufficient; but it was decided in *Hatton v. English*, 7 E. & B. 94 that it is the affidavit which must contain the description of residence and occupation of the grantor, and not the bill only, and on that point no doubt was entertained. The question whether the attesting witness is to be also so described, depends on whether the words in the section just read, applying to bills given under execution, are to be read parenthetically or not. It is clear that these words exhaust themselves upon the case of bills given under execution, and that they must be read parenthetically. The words following, then, "and of every attesting witness," must be applied to bills of sale of all sorts. It is, therefore, obvious, that according to the conclusion first come to, the description of the witness also must be given in the affidavit. Then was the description so given? The cases show that it must be true, and the case of *The London and Westminster Discount Company v. Chace* decides that the description must be true of the witness at the time of the making of the bill. This affidavit describes the witness as "Gentleman." That was not true; the term meaning a person of no particular occupation, whereas, this person had a distinct occupation; and he does not say that the description of him contained in the affidavit is true. As to the case in the Exchequer, *Banbury v. White*, 11 W. R. 785, 32 L.

* *Coram*—BOVILL, C.J., WILLIAMS, SMITH AND BRETT, JJ.

[Eng. Rep.]

ATTREE V. ATTREE.—VERNON V. VERNON.

[Eng. Rep.]

J. Ex. 258, what Pollock, C. B., there said does not apply to this case, for there the affidavit contained a description by reference of the attesting witness, and further said that it was true; here there is no reference. I therefore think the affidavit insufficient, and the rule must accordingly be discharged.

SMITH and BRETT, JJ., concurred.

CHANCERY.

(Reported by ALEX. GRANT, Esq., Barrister-at-Law,
Reporter to the Court.)

ATTREE V. ATTREE.

Will—Construction—Gift of "all the rest."

Gift of "all the rest," following a list of bequests of sums of money.

Held, to pass real estate.

[19 W. R. 464—Feb. 9, 1871.]

The holograph will of Ann Tourle Attree, dated July 12, 1851, contained a list of gifts of sums of money to divers persons, amongst which there appeared a bequest of a leasehold house at Torquay, and concluded with the words "all the rest to be divided between the daughters of F. T. Attree, son of William Attree, late of Brighton."

This suit was instituted for the purpose of administering the testator's estate, and the question was whether certain real estate to which she was entitled passed by the gift of "all the rest."

Jessel, Q.C., and Freeman, for the daughters of F. T. Attree.—The gift of "all the rest" must mean "all the rest of my estate." In *Huzstep v. Brooman*, 1 Bro. C. C. 437, a gift of "all I am worth" was held to pass real as well as personal estate. *Bebb v. Penoyre*, 11 East, 160, which will be relied upon by counsel for the heir-at-law, was incorrectly decided. In *Davenport v. Colman*, 12 Sim. 588, where the words were "whatever I may die possessed of," and in *Wilce v. Wilce*, 7 Bing. 664, where the words were "everything I die possessed of," real estate was held to pass. They also referred to *Re Greenwich Hospital Improvement Act*, 20 Beav. 458.

Esq. R. Eggingley, Q.C., and Ealmer, for the heir-at-law.—The words "all the rest" are not sufficiently large to pass real estate. *Bebb v. Penoyre* (sup.) has never been overruled. In *Huzstep v. Brooman* there was no doubt as to the testator's intention. The decision of *Davenport v. Colman* turned upon the fact that "possessed" is an apt word to express the seisin of real estate, and in *Wilce v. Wilce*, on the introductory words of the will "as touching the worldly property, &c."

Jessel replied.

Feb. 9.—Lord ROXBURY, M.R.—I think that "all the rest" means "all the rest of my property" and includes the real estate which belonged to the testatrix. It is as if she were giving instructions for her will, and said that she meant to leave all the rest to a particular person, meaning everything she had not disposed of. I will make a declaration that the real estate passed by the will.

VERNON V. VERNON.

Newspapers—Publication of proceedings—Contempt.

Where proprietors of newspapers publish an account of and comments on pending proceedings, they are guilty of contempt of Court; but a motion to commit them at the instance of a party to the suit, when it can be proved that in one case he had supplied the materials with a view to an article being written, and, in the other, that every reparation possible had been made, will be refused.

[19 W. R. Chy. 404.]

The plaintiff in this suit, John Vernon, a farmer, living at Doddenham, claimed, by right of descent, certain estates, known as the Hanbury Hall Estates, which had been in the possession of the defendant, Harry Foley Vernon and his family, for upwards of 100 years. He alleged that his title was an equitable one, and that he was, therefore, not barred by lapse of time. Notice of these proceedings was taken in the local press, and particularly in two papers—namely, *Berrow's Worcester Journal*, of which C. H. Birbeck was proprietor, and the *Worcestershire Chronicle*, of which Knight was the proprietor. The plaintiff complained that certain articles contained unfair comments upon the matters in litigation, calculated to prejudice the Court, and prevent witnesses favourable to him from coming forward. He now moved for the committal of Messrs. Birbeck and Knight for contempt of Court.

The articles referred to in the argument were two of the *Worcester Journal*, dated the 22nd and 29th of October, 1870, respectively, and one of the *Worcestershire Chronicle*, dated the 26th of October, 1870. The article of the 29th of October said that, without questioning the plaintiff's good faith, it seemed to the writer improbable that the defendant could ever be disturbed in the possession of the Hanbury demesne. The article of the 26th commenced with the words, "It is common enough for people to be possessed with the idea that they are rightful heirs to property which is held by some one else, especially if there is any affinity of blood or identity of name. We often have people coming to inquire about advertisements for heirs-at-law and next of kin, or of a large estate awaiting a claimant by birthright or descent. Not uncommonly the hallucination ends in confirmed monomania, and the unfortunate victim of guileful fancy, revelling in some shadowy sphere conjured up by his own imagination, believes in the reality of the phantoms he has peopled it with, and becomes unfitted for the duties of ordinary life." The article then proceeded to discuss the plaintiff's claim.

Birbeck's defence was, that in 1868 the plaintiff and a man named Millage, whom he was employing to collect evidence, called at the office and requested the insertion of a short article on the plaintiff's claim. It was inserted. In October, 1870, Millage, who was clearly acting as the agent of the plaintiff, called again with a print of the bill, which he showed to Birbeck, that the nature of the claim might be noticed in the journal. The result was the article of the 22nd of October. With this article the plaintiff had expressed himself pleased. After the article of the 29th had appeared, and been complained of, no more articles had appeared. There had not been the slightest wish to injure the plaintiff's cause.

Eng. Rep.]

VERNON V. VERNON.

[Eng. Rep.]

Knight's defence was, that the facts mentioned in his article were not taken from the *Journal* but were taken from *Nash's County History* and the *Annual Register*. As soon as complaint was made, he sent to the plaintiff for approval an apology, which he proposed to publish in his paper. No answer being returned, he published it in a prominent part of his paper, and offered to pay any costs he had incurred in the matter up to that time. A bill of £82 had, however, been presented to him, and, thinking that sum beyond all reason, he had declined to pay it.

Both Birbeck and Knight tendered their apologies to the Court for their unintentional contempt.

Willcock, Q. C., and *Terrell* for the plaintiff, did not press now for committal, but asked that Birbeck and Knight might be ordered to pay the costs of these proceedings. On the question of contempt of Court and prejudice to the plaintiff, they referred to *Daw v. Eley*, 17 W. R. 245, L. R. 7 Eq. 49; *Tichborne v. Mostyn*, 15 W. R. 1072, L. R. 7 Eq. 55 n; *Re Cheltenham and Swansea Railway Carriage and Waggon Company*, 17 W. R. 463, L. R. 8 Eq. 580; *Matthews v. Smith*, 3 Hare, 331; *Cann v. Cann*, *ib.* 333 n.

Kay, Q. C., and *Stallard*, for Birbeck, argued that such an article as that of the 29th of October was no ground for committal, and that, as far as the plaintiff was concerned, he alone was responsible for what had occurred. They also referred to *Daw v. Eley*.

W. Pearson, for Knight, argued that in the article of the 26th there were neither misrepresentations nor remarks calculated to prejudice the public mind against the plaintiff. He referred to Lord Hardwicke's judgment in *Roach v. Hall*, 2 Atk. 469. [The Vice-Chancellor referred to *Ex parte Jones*, 13 Vesey 237.]

Willcock in reply.

BACON, V. C., said that as this motion had been opened with the disavowal of any wish to obtain an actual committal, the contest was really as to the costs. The law of the Court was perfectly clear. It was undoubtedly a contempt to publish an account of any proceedings pending the hearing, or to make any comments upon those proceedings likely to prejudice the parties in the litigation, or to interfere with the course of justice. There was no need to discuss the cases; for, as a matter of form, the articles complained of did infringe the rule of the Court. Apart from the question of contempt, however,—which there was no need to criticise beyond saying that there was clearly no malevolence on the part of either Birbeck or Knight—was the question whether the plaintiff was entitled to complain. The remarks of the Master of the Rolls in *Daw v. Eley* were most pertinent, to the effect that a person, submitting to have his affairs discussed in a public paper, could not afterwards complain of its being done. The plaintiff or his agent Millage supplied the materials for the article of the 22nd of October; and he could not be heard to say that he had thereby bought the partiality of the editor, and interdicted him from writing in any other interest or according to the dictates of his own judgment. As to the article of the 26th, considering the circumstances under which it was written, it was clearly within the principle laid down in the case of *Tichborne v. Mostyn*, where the *Pall Mall Gazette*, having

published what was a contempt of Court, two other newspapers, which merely adopted what the *Pall Mall Gazette* had said, were held to be blameless, and were not ordered to pay the plaintiff's costs, though each had committed contempt. The same remarks applied to the article of the 29th as to that of the 22nd. Could anything excuse what took place afterwards? It was not hinted that there was any fear of Birbeck's repeating his offence. As to Knight's action in the matter, the explanation he gave of his article was not only sufficient in itself, but accompanied by the offer of the amplest apology, which apology was accordingly published at the earliest opportunity. The plaintiff nevertheless determined to go on with proceedings in that court against the two respondents, because he had a technical hold upon them. Such conduct the Court would not countenance. Though, therefore, the case of contempt was clearly made out—for it was unjustifiable in any newspaper to publish statements of the pleadings or proceedings in a pending suit, with or without comment, and especially so if there were comments which might be injurious to either side—the plaintiff himself had no right to complain, and no order would be made on this motion.

NOTES OF RECENT DECISIONS IN THE PROVINCE OF QUEBEC.

COMMON CARRIERS.

Held, that the verdict of a jury, which is contrary to law and evidence, will be set aside, and a new trial granted.

2. That the respondent was not responsible for the loss of a trunk said to contain a large sum of money, which the appellant left in charge of the baggage-keeper, contrary to the advice and instructions of the captain of the steamer, who indicated the office as the proper place of deposit; the appellant stating at the time, in answer to the captain, that he would take care of the trunk himself.—*Senecal and the Richelieu Company* (in appeal), 15 L. C. Jurist, 1.

COMPOUNDING FELONY—CONSENT OBTAINED BY THREATS NULL.

Held, 1. A signature to a note having been obtained from an old woman by threats, that if she did not sign, her son would be arrested for stealing money, an action *en garantie* will lie against the person who used the threats and extorted the note, to protect the signer from a judgment obtained by a third innocent *bona fide* holder.

2. A son having acknowledged to have stolen \$25 from M., the latter, threatening to have the son arrested, induced the mother and son to sign a note in his favor for \$400. *Held*, The note under the circumstances being signed by the mother, under the influence of

NOTES OF RECENT DECISIONS IN THE PROVINCE OF QUEBEC.

fear for her son, that there was violence, and no consent or legal consideration, and the mother could not be held liable.—*Macfarlane v. Dewry*, (In App.), 15 L. C. J. 85.

CONTEMPT—JURISDICTION.

Held, 1. That a judge of the Court of Queen's Bench, whilst sitting alone in the exercise of the criminal jurisdiction conferred upon that Court, has no jurisdiction over an alleged contempt, for publishing a libel concerning one of the justices of the Court, in reference to the conduct of such justice while acting in his judicial capacity, on an application to him in Chambers for a writ of *habeas corpus*, the matter being only legally and properly cognizable by the full Court of Queen's Bench.

2. That the issuing a rule for contempt, by the judge himself, against whom the contempt is alleged to have been committed, without any evidence that the party charged had committed the contempt, is most irregular.

3. That an admission in writing, by the party charged, at the instance of the judge, for the purpose of settling the dispute between them, must be held to have been written without prejudice, and cannot avail as evidence in support of the rule for contempt, in case the judge refuses to accept it as a sufficient apology.

4. That a fine imposed by the judge under such circumstances will be remitted.—*Ex parte Thomas Kennedy Ramsay, Q. C.* (on appeal to the Privy Council), 15 L. C. Jurist, 17.

CONTRACT—DELIVERY AND PAYMENT.

Held—That the payment of freight and the delivery of the cargo are concomitant acts, which neither party is bound to perform without the other being ready to perform the correlative act, and therefore, that the master of a vessel cannot insist on payment in full of his freight of a cargo of coals, before delivering any portion thereof.—*Beard et al v. Brown et al*, 15 L. C. J. 186.

CRIMINAL LAW.

Held, that where a party undergoing imprisonment, on conviction of felony, has been released on bail, in consequence of the issue of a writ of error, and such writ of error is subsequently quashed, he may be re-imprisoned, for the unexpired term of his sentence, on a warrant of a judge of the Court of Queen's Bench (Crown assize), signed in Chambers, and granted in consequence of the court having ordered process to issue to apprehend such party and bring him before the court, "or before one of the justices thereof, to be

dealt with according to law."—*Ex parte Edward Spelman*, 14 L. C. Jurist, 281.

FOREIGN CORPORATIONS.

Held,—1. That by the laws of the Province of Quebec corporations are under a disability to acquire lands without the permission of the Crown or authority of the Legislature.

2. That a foreign corporation which had purchased lands in the said Province without such authority, and was evicted, had no action of damages against the vendor.—*The Chaudiere Gold Mining Company v. George Desbarats, et al.*, 15 L. C. J. 44.

INSOLVENT ACT.

Held, that the right to petition to quash a writ of attachment in compulsory liquidation, under the Insolvent Act of 1864, is purely personal to the debtor, and cannot be exercised by a person to whom he has made a voluntary assignment. (Act of 1864, sec. 8, subsec. 12; Act of 1869, sec. 26).—*Watson and City of Glasgow Bank* (in appeal), 14 L. C. Jurist, 809.

INSOLVENCY—PROMISSORY NOTE—COMPOSITION.

This was an appeal from a judgment rendered in the Superior Court by TORRANCE, J., a report of which will be found at p. 21 of Vol. 14, L. C. Jurist.

Held—1. Where the endorser of a note became insolvent, and compounded with his creditors including the holder of said note, who, however, reserved his recourse against the other parties to the note, and the maker also became insolvent, that the endorser cannot rank on the note against the estate of the maker so long as the holder has not been paid in full.

2. Where a claimant in insolvency has received as holder of a note a composition on the amount of his claim from the endorser, in consideration of which he has released the endorser, reserving his recourse against the other parties to the note, that whatever the claimant has received from the endorser must be deducted from his claim against the maker's estate.—*In re Bessette et al.*, Insolvents, 15 L. C. J. 126.

INSURANCE.

Held, 1. That a *bond fide* equitable interest in property, of which the legal title appears to be in another, may be insured, provided there be no false affirmation, representation or concealment on the part of the insured, who is not obliged to represent the particular interest he has at the time, unless inquiry be made by the insurer.

NOTES OF RECENT DECISIONS IN THE PROVINCE OF QUEBEC.—CORRESPONDENCE.

2. That such insurable interest in property, of which the insured is in actual possession, may be proved by verbal testimony.—*Whyte et al. v. The Home Insurance Co.*, 14 L. C. Jurist, 801.

INSOLVENCY—PROCEDURE.

In a contestation of a claim before an assignee, the assignee having first verbally fixed upon a convenient day for hearing and taking evidence, the contestant inscribed the matter with due notice, and all the parties interested, including the assignee, appeared on the day fixed, and shewed their acquiescence as to the regularity of the proceedings by allowing the assignee to give an award without objection.

Held—The proceedings were irregular, because under sec. 71 of Insolvent Act of 1869, the day for proceeding to take evidence should have been fixed by the assignee in writing, and the assent of the parties to the above mode of proceeding could not waive the irregularities.

Semble. In such cases it would be irregular for either party to inscribe the case. *In re Richard Davis*, Insolvent, 15 L. J. C. 181.

MUNICIPAL LAW.

Held, that where a by-law of a municipal council of a county appointed a committee to acquire land, and contract for the construction thereon of a "court house, registry office and fire-proof vault," such committee exceeded its powers in contracting for the construction of a "public hall, court house, registry office and fire-proof vault," even though the cost stipulated in the by-law was not exceeded; and no action will lie against the corporation on such contract, the corporation having notified the contractor that they would not hold themselves responsible for any work done under the contract.—*Fournier dit Perfontaine v. La Corporation du Compté de Chambly*, 14 L. C. Jurist, 295.

PROMISSORY NOTES—STATUTE OF LIMITATIONS.

When a promissory note was made in a foreign country, and payable there, and the debtor, about the time of the maturity of the note, absconded from his domicile in such foreign country, and came to Lower Canada, and his domicile was discovered by the creditor, after diligent search, only about the time of the institution of the action, and it appeared that under these circumstances the plaintiff's recourse on the note would not be barred by the Statute of Limitations of the foreign country where the note was made, and where it was payable: *Held*, that the action was not

barred by the statutory limitation of Lower Canada, though more than five years had elapsed after the maturity of the note before the action was brought.—*Wilson and Joseph Demers* (in appeal), 14 L. C. Jurist, 817.

SALE OF GOODS.

Held, that where a party sells a moveable to two different persons, the one of the two who has been put in actual possession is preferred, although his title be posterior in date, provided he be in good faith.—*Maguire v. Duckue et al.*, 15 L. C. Jurist, 20.

TELEGRAPH COMPANY.

Held, 1, That sec. 16 of C. S. C. cap. 67, which declares it a misdemeanor in any operator or employee of a telegraph company to divulge the contents of a private despatch, does not apply to the production of telegrams by the secretary of the company, in obedience to a subpoena duces tecum.

2. That telegrams which have passed between a principal and his agent are not privileged communications, in a suit in which that principal is a party.—*Leslie v. Hervey*, 15 L. C. Jurist, 9.

CORRESPONDENCE.

Taxation of Costs in Chancery.

TO THE EDITORS OF THE LAW JOURNAL.

DEAR SIRS—Would you kindly, in the interests more especially of country practitioners, draw to the attention of the Chancery Judges, the injustice and delay of the present system of taxation of costs now prevailing in the Court of Chancery. After taxation by a country master, a so called revision takes place, which properly speaking is a second taxation instead. The master at Toronto, after a bill has been taxed by the master in the country, before whom all the proceedings have been had, and who exercises a discretion as to the proper costs, after hearing the arguments on both sides and inspecting the papers, puts the bill through what may be called a riddling operation, although having no papers before him, and knowing nothing of what reasons have been urged before the deputy master and given force to.

No doubt the intention of the Judges in ordering a revision, was that the master at Toronto should judge, by looking at the bill, whether the principles which govern taxations were adhered to with respect to the bills sent him for revision, but it is absurd to suppose the

CORRESPONDENCE.—REVIEWS.

Judges meant that every item should be examined into, not merely to ascertain if properly allowed on principle, but to have the master's discretionary power reviewed, or to have a portion of an item struck off. The object perhaps primarily aimed at, namely the uniformity of taxation, has no doubt now been attained, and those taxing officers who did not understand the rules have now had quite enough time to learn them from inspecting revised bills; the reason ceasing let the system cease also.

A much fairer way would be to allow either party to have costs revised on payment of the fee, instead of making it compulsory.

Yours, &c.,

SOLICITOR.

REVIEWS.

THE LAW OF NEGLIGENCE, being the first of a series of practical law tracts. By Robert Campbell, M. A., Advocate (Scotch Bar), and of Lincoln's Inn, Barrister-at-law, late fellow of Trinity Hall, Cambridge. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar; 1871.

There is no end to the law-made-easy books of this generation. Every conceivable subject is treated by some barrister, newly fledged or otherwise, who thinks it his mission to enlighten the public on legal matters.

The readers sought after in general are not those who wear the long robe, or those who provide the latter with briefs; but rather are such little books written for the supposed benefit of outsiders, who are flattered with the thought that by means thereof they will become wiser in their generation than those who apply at the fountain head. But let it not be imagined that we would speak slightly of those who therein employ their spare time, whether indeed they really think they can say something which has not been said before, or at least say it better than others, or whether they only write to bring themselves before their professional brethren and the public by what is looked upon in England as legitimate advertising. Far otherwise—they deserve all praise for their energy and industry, and the good they do, even though they may multiply chaff instead of wheat by their labours.

But whilst the title page of the book before us, humbly calling itself a "practical law

tract," leads to the foregoing train of thought, it would be a great mistake to suppose that Mr. Campbell's effort is a mere sketch, such as we have alluded to, and this any candid reader must admit. The author says in his preface that "the substance of the following essay was composed in the form of lectures or readings for pupils to relieve the dryness of our studies on the law of real property," the endeavour being to review the latest phase of judicial opinion on a familiar subject, and so to harmonise the law that so far as possible new decisions might seem to illustrate old principles, or that the extent and direction of the change, introduced by each decision might be correctly estimated.

The author commences by defining the terms he uses in expressing his meaning, and remarking upon the terms which were used by the classical jurists and modern civilians, and those which are in general use at the present time (and often very incorrectly used) in connection with the subject on which he treats.

His sympathy is with the civil lawyers whose views are modelled upon those of the great Roman jurists, as we may see in the following remarks. After comparing the rules stated by Professor Erskine in his great Treatise on the Law of Scotland, which are virtually identical with those of the Roman Law, he says:

"I, myself, prefer to adhere exactly to the language of the classic jurists themselves, which savours of their great practical experience, and which will be found singularly to harmonise with the modern decisions of our own Courts. Indeed our modern decisions, even more than the learned discourses of Holt and Sir W. Jones (to be touched on presently) reflect the language and modes of thought of the classic jurists."

The author writes well, laying down his propositions in clear and easy language, and his authorities are the most recent, and this, though of course to be expected in any work where modern law is discussed, is especially necessary in a subject which has had so much light thrown upon it by decisions in the past few years.

In speaking of what is classed as the lowest degree of responsibility, namely, "that were more than ordinary negligence is requisite to constitute injury, "or what is more popularly known as gross negligence, after referring to the leading case of *Giblin v. McMullen*, L. R. 2 P. O. Ap. 319, decided on appeal from the

REVIEWS.—CIRCUITS, 1871.

Supreme Court of Victoria to the Judicial Committee of the Privy Council, the author thus comments:

"In the judgment delivered by Lord Chelmsford as the judgment of the Court in this case, the expression "gross negligence," as used by Chief Justice Holt and since misapplied by others, is criticised, and in a qualified manner defended. But the criticism, as well as the defence of the expression, is misdirected. For it fails to point out that while Holt used the word technically as translating the technical expression *culpa lata* (*aequiparata dolo*), his successors applied it not only loosely, but in a manner grounded on misconception, as I have already pointed out. In this case (*of Giblin v. McMullen*), therefore, the expression gross negligence might well have been employed in an exact and technical sense to indicate the kind of negligence which the Roman lawyers were wont to equate to intention. Note also that in this case of *Giblin v. McMullen*, much weight is given to the circumstance that the bank kept the securities as they kept their own of the like nature. And this circumstance seems to have been thought sufficient to rebut any inference of gross negligence which might have been drawn from the mere fact of loss, and to have necessitate some positive evidence of negligence. The weight given to the circumstance of the bank keeping the goods with the same care as their own is in exact accordance with the principles of the Roman law above referred to."

Altogether it is a most readable book, containing sound law, and one well suited to students, for whom, as we have said, it was at first written.

The index is particularly good, and of course adds much to the value of the book—would that many others more intended for reference than this volume, possessed this most necessary adjunct.

TRIAL OF ELECTION CASES.

The Judges on the rota have fixed the days on which the remaining trials are to take place.

East Toronto, at the Court House, Toronto, Saturday, 2nd September.

West Toronto, at the Court House, Toronto, Thursday, 7th September.

Prince Edward, at the Court House, Picton, Tuesday, 26th September.

Russell, at the Court House, Ottawa, Wednesday, 23rd August.

West York, Queen's Bench, Osgoode Hall, Tuesday, 5th September.

North York, Newmarket, Tuesday, 22nd August.

South Grey, Court House, Owen Sound, Tuesday, 12th September.

Monck, Dunville, Tuesday, 22nd August.

Welland, Court House, Welland, Monday, 9th October.

North Simcoe, Court House, Barrie, Monday 16th October.

The trial in the Stormont case is enlarged until the 12th September next, and the Brockville petition stands until the 9th of January, 1872.

We cannot say for certain, as yet, how the work will be divided, but it is thought that the Chief Justice of Ontario will try the two Toronto and the Prince Edward petitions; Chief Justice Hagarty, Russell, and West and North York; Vice-Chancellor Mowat, South Grey, and Monck; and Vice-Chancellor Strong, Welland, and North Simcoe. But nothing can be said with certainty as to this at present.

AUTUMN CIRCUITS, 1871.

EASTERN CIRCUIT.—*The Chief Justice of Ontario.*

Pembroke	Wednesday	Sept. 13
Perth	Monday	" 18
Brockville	Thursday	" 21
Kingston	Tuesday	" 26
Ottawa	Monday	Oct. 9
L'Orignal	Wednesday	" 18
Cornwall	Tuesday	" 24

MIDLAND CIRCUIT.—*The Chief Justice of the Common Pleas.*

Napanee	Monday	Sept. 18
Picton	Thursday	" 21
Belleville	Monday	" 25
Whitby	Tuesday	Oct. 10
Peterborough	Monday	" 16
Lindsay	Friday	" 20
Cobourg	Monday	" 30

NIAGARA CIRCUIT.—*Mr. Justice Morrison.*

Milton	Thursday	Sept. 14
Owen Sound	Tuesday	" 19
Barrie	Monday	" 25
St. Catharines	Tuesday	Oct. 17
Welland	Monday	" 23
Hamilton	Monday	" 30

OXFORD CIRCUIT.—*Mr. Justice Wilson.*

Brantford	Monday	Sept. 18
Cayuga	Wednesday	" 27
Simcoe	Monday	Oct. 2
Berlin	Monday	" 9
Stratford	Thursday	" 12
Woodstock	Monday	" 23
Guelph	Monday	" 30

WESTERN CIRCUIT.—*Mr. Justice Gwynne.*

London	Monday	Sept. 11
St. Thomas	Wednesday	" 20
Walkerton	Wednesday	" 27
Goderich	Monday	Oct. 2
Sarnia	Wednesday	" 11
Sandwich	Monday	" 16
Chatham	Monday	" 23

HOME CIRCUIT.—*Mr. Justice Galt.*

Brampton	Tuesday	Sept. 19
Toronto	Tuesday	Oct. 17

PARLIAMENTARY ELECTIONS.

DIARY FOR AUGUST.

1. Tues. *Leamas.*
6. SUN. *9th Sunday after Trinity.*
13. SUN. *16th Sunday after Trinity.*
14. Mon. Last day for County Clerks to certify county rates to municipalities in counties.
20. SUN. *11th Sunday after Trinity.*
21. Mon. Long Vacation ends.
23. Wed. Last day for setting down and giving notice for re-hearing in Chancery.
27. SUN. *12th Sunday after Trinity.*
28. Mon. County Court Term (York) begins.
31. Thur. Re-hearing Term in Chancery.

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AUGUST, 1871.

PARLIAMENTARY ELECTIONS.

Next to the excitement which more or less attends every election contest, the important question whether the successful candidate will retain his seat, is certainly, to one individual at least, a subject of very anxious consideration. The good old days, as it is the fashion to call them, in which any candidate who was successful enough to find his way into the House, no matter by what corrupt means, and who might, if he was on the proper side, retain his seat for two, if not three or four years, until a grateful ministry had rewarded his fidelity, have long since passed away. The candidate who is now successful at the polls, in the event of a petition being filed against his return, finds that the real difficulty of an election contest is not in obtaining, but in retaining his seat. It is not alone that he himself must be blameless in every particular which the Act specifies, and, so to speak, have it and its penalties constantly before his eyes, but that his agents, those terrible necessities of an election contest, whose rash and intemperate zeal, in most instances looks only to the end, indifferent to the means by which it is to be attained, should likewise have exercised a careful supervision not only over their own acts, but those whom they have employed under them. The recent trials under the Controverted Elections (Ontario) Act of 1871, have demonstrated so far, that if it is a hard task to obtain a seat in Parliament, it is also an easy matter to lose it.

Of fifteen petitions against the return of members declared elected at the recent contest for the Legislative Assembly of the Province of Ontario, three only have been disposed of. In two of these, Prescott and Carleton, the former tried before the Chief Justice of Ontario, the latter before Mr. V. C. Mowat, the election has been declared void.

In Glengarry the successful candidate has retained his seat. Stormont and Brockville have not been finally disposed of, the former being adjourned until the 12th of September next, the latter until the 9th of January.

The others come on at various times after Vacation, the latest being North Simcoe, on the 16th of October.

That branch of the law relating to the election of members of Parliament is, in a general way, very much misunderstood, not only by those who do not belong to the profession, but by the majority of the members of the profession itself; the prevailing opinion in most cases being that the Ontario Act of 1871 is a compendium of the whole law on election matters, whereas in fact it only establishes the tribunal and the procedure by which election petitions are to be tried, and imposes certain penalties for acts defined not in it alone, but in the various Acts of Parliament which precede it and on which it is based.

There seems also to be a general impression, chiefly outside the profession, that those Acts of Parliament which govern the law relating to election matters in the Province of Ontario, are so nearly identical with the laws of England in that respect, that the decisions of the English Judges should be the rule of guidance in this country. A careful comparison, however, of the Imperial and Ontario Statutes will show, that although in some instances the different sections of the separate Acts are word for word the same, yet, as will be hereafter shown, they do differ in some points so very materially, that they might be said to alter the whole scope of the Act in that respect.

Before going into the question, therefore, of the various points already decided in the late trials under our own Acts, it will be important to notice the Imperial Acts of Parliament affecting the question of Election Petitions, and point out, as briefly as possible, the distinction between the Imperial and the

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Ontario Statutes, in those cases more especially where the Ontario Statute has in a great measure, and so far as circumstances admitted, been copied from the Imperial Act.

Various statutes were, from time to time, passed in England in order to supply the deficiencies of the Common Law, or law of Parliamentary usage. These were consolidated in the "Corrupt Practices Prevention Act, 1854," 17 & 18 Vic. c. 102, and from this statute the Ontario Act, 32 Vic., cap. 21, has copied many of its provisions.

Sections 67 and 68 of the Ontario Act, 32 Vic., defining bribery, correspond very closely with Sections 2 & 3 of the (Imperial) Corrupt Practices Prevention Act of 1854, and section 72 of the same Ontario Act defining undue influence, is identical with section 5 of the Imperial Statute.

Sections 63 and 64 of the Ontario Statute as to the furnishing or carrying party ensigns, flags, &c., either before or during the election, are materially the same as the Imperial Statute, and section 66 of the Ontario Statute, as to the closing of taverns on the polling-day, is substantially the same as the Imperial Act.

The distinction between section 4 of the Imperial Statute, defining the offence of treating, and the only section of the Ontario Act which at all corresponds with it, is so marked, that it will be as well to give both sections in full.

By sec. 4 of Imp. Stat.: "Every candidate at an election who shall corruptly by himself, or by or with any person, or by any other ways or means, on his behalf at any time, either before, during or after any election, directly or indirectly, give or provide, or cause to be given or provided, or shall be accessory to the giving or providing, or shall pay wholly or in part any expenses incurred for any meat, drink, entertainment or provision to or for any person in order to be elected, or for being elected, or for the purpose of corruptly influencing such person, or any other person, to give or refrain from giving his vote at such election, or on account of such person having voted or refrained from voting, or being about to vote or refrain from voting at such election, shall be deemed guilty of the offence of treating, and shall forfeit the sum of £50 to any person who shall sue for the same, with full costs of suit; and every voter who shall corruptly accept or take any such meat,

drink, entertainment or provision, shall be incapable of voting at such election, and his vote, if given, shall be utterly void and of none effect."

Section 61 of the Ontario Statutes is as follows—"No candidate for the representation of of any county, riding, city, town, or other electoral division, shall, with intent to promote his election, nor shall any other person, with intent to promote the election of any such candidate, either provide or furnish entertainment at the expense of such candidate or other person, to any meeting of electors assembled for the purpose of promoting such election, previous to or during the election at which he is a candidate, or pay for, procure or engage to pay for any such entertainment; except only that nothing herein contained shall extend to any entertainment furnished to any such meeting of electors, by or at the expense of any person or persons, at his, her, or their usual place of residence."

In secs. 2, 3 and 5 of the Imperial Statute (Act of 1854), bribery, treating, and undue influence are defined; and by section 36 of the Act, it is declared that any candidate who has been found guilty by a Committee of the House of Commons of either bribery, treating or undue influence by himself or his agents, shall be incapable of being elected or sitting during the then existing Parliament.

In the Ontario Statute (Act of 1868,) sections 67 and 68 define the offence of bribery, and section 69 declares that if any person be proved guilty before an election committee of using any of the means defined in those sections to procure his election, his election shall thereby be declared void.

Section 61 of the Ontario Act, already quoted, forbids the treating of meetings of electors, and section 65 of the same Act imposes a penalty of one hundred dollars, to be incurred by any person offending against the provisions of said section 61.

Section 72 of the Ontario Act of 1868, defines the offence of undue influence, and imposes a penalty of two hundred dollars, to be incurred by any person offending against its provisions.

So far, therefore, as the Ontario Act of 1868 is alone concerned, it would appear that the offences of treating contrary to section 61, and undue influence, merely impose a

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penalty on the person offending, and that bribery either by the candidate or his agent is the only offence that will void an election.

The distinction, therefore, between the Corrupt Practices Prevention (Imperial) Act of 1854, and the Ontario Act of 1868, which (for the purpose of a comparison between them) may be called the corresponding Act, is very important. By the Imperial Act, bribery, treating,—either of an individual or a meeting,—and undue influence either by the candidate or his agent, will void an election. By the Ontario Act only the offence of bribery by the candidate or his agent will have the same effect.

It will now be important to consider the Imperial Statute 31 & 32 Vic. cap. 125, to which the Ontario Statute, 34 Victoria, commonly called the Controverted Elections Act of 1871, corresponds, and note the distinctions between the two Acts, in so far as they affect the conclusions arrived at above with reference to the Imperial Act of 1854, and the Ontario Act of 1868.

By the Imperial Statute, 31 & 32 Victoria, section 3, bribery, treating and undue influence are declared to be corrupt practices; and by section 46 of the same Act it is declared that for the purpose of disqualifying a candidate in pursuance of section 36 of the Corrupt Practices Prevention Act of 1854, (a candidate guilty of corrupt practices other than bribery within section 43 of the 31 & 32 Victoria), the report of the Judge, before whom the election petition is tried, shall have the same effect as the report of a Committee of the House of Commons.

Section 43 of the same Act enacts that wherever it is proved that *bribery* has been committed by or with the knowledge or consent of the candidate, he shall be deemed guilty of personal bribery, and imposes certain very severe disqualifications for seven years.

By the Ontario Act, 34 Victoria, the Controverted Elections Act of 1871, section 46, it is declared that when any *corrupt practice* has been committed by or with the knowledge and consent of any candidate at an election, his election, if he shall be elected, shall be void, and he shall during the eight years next after the date of his being so found guilty, be incapable of being elected to, and of sitting in the Legislative Assembly, and various other

disabilities. Section 3 of the same Act defines "corrupt practices," or "corrupt practice," to mean bribery and undue influence, and illegal and prohibited acts in reference to elections—or any of such offences—as defined by Act of the Legislature.

It will be remembered that section 61 of the 32 Victoria, prohibited the treating of electors, and imposed certain pecuniary penalties on any person guilty of the offence, but did not void the election, and that section 72 of the same Act defined the offence of undue influence, and imposed a penalty on any person committing the offence, but also did not void the election.

The 34 Vic. section 3, as we have seen, defines "corrupt practice" or "corrupt practices" to be bribery and undue influence, *and illegal and prohibited acts* in reference to elections,—or any of such offences—as defined by Act of the Legislature.

It is presumed that this definition will be held not to include every trifling act, but only such as partake of the same nature essentially as bribery and undue influence.

It will be seen, therefore, that by the joint operation of these two Ontario Acts, 32 & 34 Vic., bribery, undue influence, and perhaps the treating of meetings of electors, contrary to section 61 of the 32 Vic., by or with the knowledge or consent of the candidate, will void the election, but that the only offence that will affect the seat, when committed *by an agent*, is the offence of bribery.

What will void an election, therefore, under the existing law of the Province of Ontario may be generally stated to be:

Bribery, and it may be treating, under section 61 of 32 Vic., or undue influence by or with the knowledge or consent of the candidate himself, and also, possibly, general bribery, general treating, or general rioting throughout the constituency, although the candidate may have been wholly unconnected by himself or his agents with such general bribery, treating or rioting; but that bribery only *by an agent*, in the parliamentary sense of the term, will void the election, differing in this respect apparently from the law of England, for there, not only bribery, but also treating and undue influence by the act of the agent will have that effect.

As to what will render void a vote.—By section 47 of the 34 Vic., it is declared that "if

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on the trial of any election petition it is proved that any corrupt practice has been committed by any elector voting at the election, his vote shall be null and void." The meaning of "corrupt practice" has been already referred to, and will include bribery, undue influence, and treating meetings of electors, contrary to section 61 of 32 Vic. cap. 21.

In regard to the disabilities imposed by both the Imperial and Ontario Statutes, on parties offending against their provisions, it will be sufficient to state generally, that by the Imperial Act, section 43, bribery committed by or with the knowledge and consent of the candidate, will incur the severe disabilities provided by that Act, and which extend to a period of seven years against the offender. By the Ontario Act, section 46, any corrupt practice (which will include not only bribery, but also undue influence, and possibly treating contrary to section 61) committed by or with the knowledge and consent of any candidate of an election, will incur the disabilities provided by the Act, and which in the Ontario Statute extend to a period of eight years against the offender.

The subject of bribery is too vast to enter upon in an article necessarily so restricted as the present, but in fact section 67 of the 32 Victoria defines the offence so minutely that any remarks on the subject generally, or any allusions to the numerous cases are to a certain extent unnecessary.

- The subject of agency, however, forms so important a feature in all election matters, and especially that of bribery under our Act, that it will not be out of place here to notice a striking peculiarity in the law of elections on this subject, and that is, the great distinction which exists between the principles of agency, as ordinarily acted upon by courts of law, and those which have been followed in election inquiries. The relation between a candidate and his agent is not the same as that which is understood to exist by the ordinary use of the terms principal and agent; for a candidate is held to be responsible for the wrongful acts of his agent for election purposes, not only when they have been committed without his consent, but even when done contrary to his express command.

On the subject of agency, generally, see the *Taunton Case*, 1 O'M. & H., 182, also the *Ovenry Case*, *Id.*, 107. It has been com-

pared to the relation of master and servant in the *Westminster case*, 1 O'M. & H., and to sheriff and deputy-sheriff in the *Taunton Case*, *Id.*, 1 O'M. & H., 182.

Treating, so far as section 61 of the 32 Vic., chapter 21, is concerned, has been already referred to. The law as to treating, independently of that section, is in a very unsettled state, but probably in this Province no corrupt treating, which does not amount to bribery by means of meat and drink, will affect the seat. It is possible that general treating, which would have avoided an election at common law, will have the same effect here, but no branch of the law of elections is, as has already been stated, in a more unsettled state than this.

As to undue influence, section 72, of the 32 Victoria, declares, "every person who shall directly or indirectly, by himself or by any other person on his behalf make use of or threaten to make use of, any force, violence or restraint, or inflict or threaten the infliction by himself or by or through any other person, of any injury, damage, harm or loss, or in any manner practise intimidation upon or against any person in order to induce or compel such person, to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who shall, by abduction, duress, or any fraudulent device or contrivance, impede, prevent or otherwise interfere with the free exercise of the franchise of any voter, or shall thereby compel, induce or prevail upon any voter either to give or refrain from giving his vote at any election, shall be deemed to have committed the offence of undue influence, and shall incur a penalty of two hundred dollars."

This clause seems almost identical with section 5 of the Imperial Act of 1859.

In the *Westbury case*, 1 O'M. & H., before Willes, J., a manufacturer named H. who had been asked by a candidate for his vote and interest, canvassed his workmen and dismissed some because they voted against his wishes. He became a member of the candidate's committee and canvassed for him. He told some of his men who were going to vote the other way that if they did they should have no more employment from him. They did in fact leave his employ before the elections.

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The Judge, commenting on the words of the Act, says, "they are large enough to include every sort of intimidation, every sort of conduct which would operate upon the mind of another and terrify or alarm him into doing what the person misconducting himself willed of his own free will. * * * There was terror, whether it be more or less, still a terror amounting to intimidation at H.'s factory for some time before the elections, and a strong feeling that men would be dealt with differently according as they voted one way or the other, which feeling, produced by illegitimate means, is to be prevented, and the persons who are likely to feel it are to be protected by law."

In the *Northallerton case*, 1 O'M. & H. 167, Willes, J., says, "a mere attempt on the part of an agent to intimidate a voter, even though it were unsuccessful, would avoid an election."

In the *Galway case*, *Id.* 303, Keogh, J., says, "The landlord has his vote, and his tenants have their votes, and is it to be said that the landlord is to use no influence with his tenants? I deny the proposition altogether. I say that it is right and becoming that a landlord should use his influence with his tenants, and so long as he does not exercise that influence in an illegitimate way, no steadier or safer or more legitimate influence can be used."

Again, in reference to priestly influence, he says, "It has been found that in various churches the celebration of the mass was suspended after the first gospel, in order to lecture the people upon the conflicting claims of the different candidates. I think it well that the house of God should not be made a place for delivering political discourses in at all, but I pass that by as a matter of trifling importance. I recognize the full right of the Catholic clergy to address their congregations, to tell them that one man is for the country, and another man is against the country. Nay, more, I would not hold a very hard and fast line as to language which, in excited times, may be used by Catholic ecclesiastics, or by civilians. They may be impatient and zealous and wrathful, provided they do not surpass the bounds of what is known to be legitimate influence."

In the *Longford case*, 2 O'M. & H. 6, Fitzgerald, J., says, "The Catholic priest has, and he ought to have, great influence. * * In the proper exercise of that influence on electors,

the priest may counsel, advise, recommend, entreat and point out the true line of moral duty, and explain why one candidate should be preferred to another, and may, if he think fit, throw the whole weight of his character into the scale, but he may not appeal to the fears, or terrors or superstitions of those he addresses. He must not hold out hopes of reward here or hereafter, and he must not use threats of temporal injury or of disadvantage, or of punishment hereafter. He must not, for instance, threaten to excommunicate or to withhold the sacraments, or to expose the party to any religious disability, or denounce the voting for any particular candidate as a sin, or as an offence involving punishment here or hereafter. If he does so with a view to influence a voter or to affect an election, the law considers him guilty of undue influence. As priestly influence is so great, we must regard its exercise with extreme jealousy, and seek by the utmost vigilance to keep it within due and proper bounds."

In the *Tipperary case*, *Id.* 31, Hague, B., says, "A priest's true influence ought to be like a landlord's true influence, springing from the same sources, mutual respect and regard, sympathy for troubles, losses, sound advice, generous assistance and kind remonstrance, and when these exist a priest can exercise his just influence without denunciation, and a landlord can use his just influence without threat or violence."

In the *Lichfield case*, 1 O'M. & H. 22, Willes, J., says, "The law cannot strike at the existence of influence. The law can no more take away from a man who has property, or who can give employment, the insensible but powerful influence he has over those, whom, if he has a heart, he can benefit by the proper use of his wealth, than the law could take away his honesty, his good feeling, his courage, his good looks, or any other qualities which give a man influence over his fellows. It is the abuse of influence with which alone the law can deal. Influence cannot be said to be abused because it exists and operates."

Again, referring to our own cases:

The *Stormont Election case*, tried before the Chief Justice of Ontario, so far as it has already proceeded, consisted entirely of a scrutiny. The recriminatory charge of bribery was not pressed, and, as counsel intimated, will most likely be dropped.

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It will be unnecessary here to notice more than a very few decisions in regard to it (as a full report of the case is given in this number), and these more particularly as showing a business relationship (if it can be so expressed) which is peculiar to Canada, viz.: that of father and son living together on the father's property; the son, in consideration of working the place and supporting his parents, being entitled to a certain share of the proceeds, over which he exercises, or assumes to exercise, a power of disposition uncontrolled by any one; and in many instances, this being extended to the whole of the father's property being made over to the son, on the consideration already stated, of the son supporting his parents.

Nothing seems more natural than for a parent, as he grows old, to desire that his declining years should be provided for by his son, not alone from a feeling of natural affection on the part of the son, but from a sense of gratitude to the father for his generosity in giving up to the son that which he might have retained during his own life. In most cases, of course, everything would eventually belong to the son, but the desire of proprietorship is natural to all, and the son would feel under a stronger obligation to be kind and affectionate to his parents from their trusting him with a management, than if he had been kept in a subordinate position, until in the course of nature he should inherit the property.

No doubt, in most cases, such an arrangement is productive of a very affectionate relationship between the father and the son, more especially in those cases in which the arrangement is made under a sense of right and justice on the part of the father, to mark his acknowledgment of the filial care of the son, and his industry and zeal in improving the place. But every arrangement of this kind could not in the course of nature be expected to be formed on so satisfactory a basis, and it often happened that the son received from the father only what the latter could not avoid giving if he wished to retain the services of the former.

The agreement in general was a mere verbal one; and in consequence the evidence of the father as to the son's right of proprietorship in many cases materially differed from the son's view of the same subject; the father's understanding of the agreement in general

being, that part of the proceeds, or the whole place (as the case might be), was to be absolutely the son's, so far as that ownership was consistent with the father, on his son's displeasing him, immediately resuming complete control of everything. The son's understanding in most cases being, that either as to a share of the proceeds, or as to ownership generally of a part or whole, it was complete and, as he understood it, infeasible.

To lay down any general principle under these circumstances, as to what interests on the part of the son did or did not constitute a vote, might well be considered difficult.

The rota judges, however, seemed to have been quite prepared for the state of things which the evidence in the Stormont and Brockville petitions showed to exist in the country, and they had decided to adhere to certain rules as to what would govern them in determining the franchise, securing in this manner uniformity, so far as this could exist in a matter where the evidence, although in a general way similar, yet in each case presented some peculiarity distinguishing it from the others.

Thus, in the *Stormont Election Case*, the learned Chief Justice held, that where father and son lived together on the father's farm—and the father was in fact the principal to whom money was paid, and who distributed it—and the son had no agreement binding on the father to compel him to give the son a share of the proceeds of the farm, or to cultivate a share of the land, and the son merely received what the father's sense of justice dictated, the son had no vote.

And in a milling business where the agreement between the father and the son was, that if the son would take charge of the mill and manage the business, he should have a share of the profits; and the son, in fact, solely managed the business, keeping possession of the mill and applying a portion of the proceeds to his own use, it was held that the son had such an interest in the business, and, while the business lasted, such an interest in the land as entitled him to vote.

And where the father had made a will in his son's favour, and told the son if he would work the place and support the family, he would give it to him, and the entire management remained in the son's hands from that

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time, the property being assessed in both names, the learned Chief Justice held that the son worked the place merely for the support of the family, and his own expected possession under his father's will, and that he was not entitled to vote.

In the *Brockville Election Case* the learned Chief Justice of the Common Pleas held, that where there was an agreement between the father and the son that the son should have one-third of the crops as his own, and such agreement was *bond fide* carried out, the son was entitled to vote.

Again in another case the same learned judge held, that where, for some time past, the owner had given up the entire management of the farm to his son, retaining his right to be supported from the produce of the place, the son dealing with the crops as his own and disposing of them to his own use—the vote was good.

The same learned judge also determined that where a jury would on the evidence be warranted in finding that the crops (say in the year preceding the last assessment) were the property of the voter, the vote would be good.

The general principle guiding these decisions seems to have been that where the agreement between the father and the son was as to a share of the crops, the son should have an actual existing interest in the crops growing and grown, and a power of disposition over the whole or a portion of them, to entitle him to a vote.

And in those cases where the agreement was as to the farm itself or a portion of it, the son should have an occupation, whether as tenant or otherwise, distinct from the father and independent of him, in order to entitle him to a vote.

In the *Glengarry Case*, before Hagarty, C.J. it was alleged, *inter alia*, in the petition, that that the respondent had been guilty of treating contrary to 32 Vic. cap. 21, sec. 61.

It was shewn in evidence, that the respondent had represented the same constituency during the last parliament: that he was a man of liberal habits; that he had on two occasions after addressing a meeting of electors and others, treated all persons present to liquor; that at the time that he so addressed the meetings he had not determined to stand again for the constituency; and that his object in addressing the meetings was, to explain his

conduct during the late parliament. His lordship in delivering judgment said: "Under the 61st section of the Act of 1868, I should have had little doubt in deciding that the only consequences under that statute would have been the penalty of \$100. The late Act, however, has raised a question as to whether this comes under the head of a corrupt practice, as being an illegal and prohibited act in reference to elections. If it comes under that description, it not only avoids the election, but renders the candidate liable to the grievous personal disabilities set forth in the Act, for the period of eight years. If the case before me turned upon the naked question, whether the matter prohibited by section 61 was under the present law as to corrupt practices, with all its heavy consequences, I should reserve the legal point for the consideration of the court; but, for the purposes of this case, I shall treat it as such, subject to the modification that I think by all fair rules of statutable construction, I am bound to hold that the evidence must satisfy me that what was done, was done corruptly. When the statute says the candidate shall not do a thing with intent to promote his election, I think it must mean something beyond the literal meaning of the words. If he contemplates being a candidate, every step he takes, the issuing of handbills, canvassing of electors, the mere act of travelling to any given point, and a hundred other things, may literally be said to be done with intent to promote his election. When, therefore, a charge like the present is made, I think the evidence must satisfy the judge, beyond reasonable doubt, that the giving of the entertainment was intended directly to influence the electors, and to produce an effect upon the electors. If not so, why were those words introduced? They are quite useless, if it was intended to prohibit the mere giving of entertainment to a meeting of electors, absolutely without reference to the giver's intention and design in the act of giving. In short, if the legislature make it a corrupt practice to give entertainment with intent to promote his election, it must, in my judgment, compel a decision that the intent to promote must be a corrupt intent, in the legal sense of the term as hereinafter explained. I am dealing with a statute avowedly in its preamble aimed at corrupt practices, which Act at the same time pointedly omits all mention of treating from

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its language. Whenever therefore, the act prohibited is not in its very nature necessarily corrupt, such as bribery, I feel an almost insuperable difficulty in holding it to be a corrupt practice involving such momentous consequences, unless it be done corruptly."

His lordship then cited a number of English cases upon the meaning of the term "corruptly," among which were the *Bewdley Case*, 1 O'M. & H. 19; *Hereford, Ib.* 195; *Lichfield, Ib.* 25; *Coventry, Ib.* 106; *Bodmin, Ib.* 125, and then continued, "On both the occasions when entertainment was given, the respondent, according to his uncontradicted evidence, was still undecided as to his becoming a candidate. When the meeting breaks up, he offers, and does treat all persons there: the amount expended was, on the first occasion \$5; in the second \$12. I feel bound to say that the evidence given by the respondent seemed given with great candour, and favorably impressed me as to its truth, and I feel wholly unable to draw from it any honest belief, that he provided this entertainment, consisting apparently of a glass of liquor all round, with any idea that he was thereby seeking to influence the election, or promote his election in any of the senses referred to in the cases. He was unaware of the state of the law upon this subject, as he says. He is not to be excused upon the ground of his ignorance; but the fact (his ignorance), is not wholly unimportant as bearing on the common custom of the country, too common as it unfortunately is, of making all friendly meetings the occasion or the excuse of a drink or treat. The strong impression on my mind, and I think it would be the impression of any honest jury, is that the treats in question were just given in the common course of things, as following a common custom. In the appropriate language already cited, the judge must satisfy himself, whether that which was done, was really done in so unusual and suspicious a manner, that he ought to impute to the person a criminal intention in doing it."

And in connection with the above remarks of the learned Judge, we will quote the language of Mr. Justice Willes, in the *Westbury Case*, 1 O'M. & H. 50, where he says that "he did not wish it to be supposed (as had been supposed by some people from some expression of his in another case) that treating a single glass of beer would not be treating if

it were really given to induce a man to vote or not to vote. All he had ever said was that that was not sufficient to bring his mind to the conclusion that the intention existed, to influence a man's vote by so small a quantity of liquor."

It will be unnecessary here to follow further the judgment in this case, but merely to state that the learned Judge held that the respondent had been duly returned.

In the *Carleton Election Case*, tried before V. C. Mowat, certain acts of bribery were proved, and the counsel for the respondent admitted that bribery had been committed by an agent, but without the knowledge or consent of the candidate. The election was declared void.

It will be important to notice, in reference to this election petition, one or two decisions given by the learned Judge who tried it.

In reference to section 8 of the 32 Vic., which declares that "no returning officer, deputy returning officer, election clerk, or poll clerk, and no person who at any time, either during the election or before the election, is or has been employed at the said election, or in reference thereto, or for the purpose of forwarding the same, by any candidate, or by any person whomsoever, as counsel, agent, attorney, or clerk, at any polling place at any such election, or in any other capacity whatever, and who has received or expects to receive, either before, during, or after the said election from any candidate, or from any person whomsoever, for acting in any such capacity as aforesaid, any sum of money, fee, office, place, or employment, or any promise, pledge or security whatever, therefor, shall be entitled to vote at any election," it was held that where a voter had voted without having received any money or offer of money, or without the expectation of receiving any money, and after he had voted he was employed as paid agent, the vote was good.

In reference to the question of the reception of evidence of what took place at a former election, it was held that evidence might be given of any circumstances connected with any former election, when that circumstance, threw, or tended to throw any light upon the election, the subject of the petition in question.

In the *Brockville Case* evidence has been given intended to show that undue influence

PARLIAMENTARY ELECTIONS.—ELECTION PETITIONS.

was used to affect the election, but no decision has been given in the case as it was necessarily adjourned to a future day, and any remarks would of course be premature and useless at the present stage.

In the *Prescott Case*, tried before the Chief Justice of Ontario, evidence of bribery on the part of an agent, but without the knowledge and consent of the candidate, was given, and the counsel for the respondent admitted that sufficient evidence was proved to void the election. The respondent, in his evidence, having distinctly denied any act of bribery whatever, and no act being proved against him, the counsel for the petitioners stated that they did not wish to pursue the matter further.

The learned Chief Justice, in delivering judgment declaring the election void, made the following remarks:—

"I have some doubt whether I ought not to direct that notice be given to the parties under the statute guilty of corrupt practices, that they may have an opportunity of being heard, so that I may decide and report to the Speaker on that subject under sub-section 6 of section 17 of Controverted Elections Act of 1871. The Act, however, having been passed so recently before the election, the practice under the Act being new, the Judges being much pressed for time in carrying out the Act, the delay which must ensue if these proceedings are adjourned to give the proper notice to the parties who are apparently the most active in the corrupt acts, the inconvenience to all parties concerned, and the fact that the parties may still be prosecuted for penalties, induces me to consent to the matter not being prosecuted further."

The Act has been passed too recently to make any remarks on its general merits. The penalties are certainly very severe on any party offending against its provisions; and although it may be admitted that a strong reform was needed in election matters generally, it must be conceded that to enforce at the present time such harsh penalties and disabilities as the Act provides, on persons who were, in most cases, completely ignorant of its provisions, would be unjust and unnecessary. No doubt the Act will be very beneficial as to the future purity of election contests, but in view of the fact that it has been so recently passed, it seems only

reasonable that justice should be tempered with mercy in dealing with offenders.

An enormous amount of extra labor has been thrown on the Judges by the Act, and those of them who have been on the *rota* for the present elections, have had a very great responsibility in deciding the various points that have come up on the trials of the election petitions, so far as they have already gone, and been decided, on most of which the decisions under the English Acts (those which in a measure correspond to our own) have been of little or no service.

There is no doubt but that some machinery is required to relieve the Judges of the interminable process of a scrutiny, but any remarks on the manner this is performed in England, and the work of revising barristers generally there, or as to the propriety of making the assessment rolls conclusive, except in cases of personation, &c., must be left for future discussion.

ELECTION PETITIONS.

We devote most of our space in the present number to the consideration of matters arising under the recent Election Acts. The report of the Stormont case, so far as it has gone, and the notes of decisions in the Brockville case, have been carefully prepared, and will be read with interest, especially by those engaged in working up the election cases which are yet to be tried.

An extra number of copies of this issue of the *Journal* have been struck off, and may be obtained from the publishers.

We are requested to state that Mr. C. A. Brough, barrister, of this city, is preparing a manual on the existing Election Law, with notes of the decisions in England and Canada, and an introduction treating of the subject of agency as affecting Parliamentary Elections.

We trust the work may be attended with that success which the ability of the author warrants us in predicting that it will deserve.

JUDGE FAIRFIELD.

We regret to record the death of David L. Fairfield, Esq., Judge of the County Court of the County of Prince Edward, which took place on the 8th instant.

The deceased gentleman, who was in his 69th year, was one of the earliest settlers of the Bay Quinte district, and had held the posi-

DIFFERENCE BETWEEN A RECEIPT AND A RELEASE UNDER SEAL.

tion of County Judge for nearly a quarter of a century. Dignified but courteous in his bearing, a man of unimpeachable integrity and excellent judgment, his loss will be very deeply felt in the community of which he has been so long a useful and respected member.

SELECTIONS.

DIFFERENCE BETWEEN A RECEIPT AND A RELEASE UNDER SEAL.

A passenger who was injured in a railway accident accepted a sum of money by way of compensation, and signed a receipt which was expressed to be in discharge of his claim in full upon the railway company for all loss sustained and expenses incurred by the accident. After signing this receipt he became worse and applied for further compensation, which the railway company refused to give him; and he commenced an action at law against them, in which he claimed heavy damages. The company pleaded the common plea of payment and receipt of the sum of money in satisfaction of the plaintiff's claim, upon which the plaintiff, instead of replying to the plea, filed his bill, alleging that he had not replied because he was advised that the plea was a full and complete answer at law to his cause of action, and praying that the defendants might be enjoined from relying on the plea at the trial of the action, and from setting up the receipt as a satisfaction of the damages claimed, except to the extent of the sum already paid. The judgment of Vice-Chancellor Malins, who granted the injunction, is not reported, but the judgment of the lords justices, who reversed the decree of the vice-chancellor, and dismissed the bill with costs, is fully reported. *Lee v. Lancashire and Yorkshire Railway Co.*, 19 W. R. 729.

It is, or was, a common but reprehensible practice with railway companies, after an accident had occurred, to get the sufferers to sign a receipt, accepting a sum of money down for the injuries they have sustained, before they well knew the extent of those injuries. See the remarks of the Lord Justice Mellish (19 W. R. 732) on this practice. In cases of this description a bill will lie to restrain the railway company from relying on the plea that the plaintiff in the action received the sum in accord and satisfaction (*Stewart v. Great Western Railway Company*, 18 W. R. 907), by reason of the fraud involved.

The bill in *Lee v. Lancashire and Yorkshire Railway Company, sup.*, was probably filed on the authority of *Stewart v. Great Western Railway Company, sup.*; but in *Stewart v. Great Western Railway Company* fraud was alleged on the part of the company's agents, and that the company intended to rely on the receipt thus obtained as a defence to the action. This allegation gave the court juris-

dition, and enabled the lord chancellor to overrule the demurrer, although the bill did not go on to pray compensation. In *Lee v. Lancashire and Yorkshire Railway Company* no case of fraud was made by the bill or proved at the hearing, and the bill was dismissed on the ground that, in the absence of fraud, the plaintiff could not want the aid of a court of equity. In fact, the plaintiff did not want the aid of the court to set aside the receipt. This is apparent when we consider what the true nature of a receipt is, as distinguished from a release under seal. A release under seal extinguishes the debt (*Coppin v. Coppin*, 2 P. Wms. 295), or rather acts as an estoppel, and can only be set aside on bill filed, or under the equitable jurisdiction of a court of law. But a receipt, according to Abbot, C. J., in *Skaife v. Jackson*, 3 B. & C. 421, is nothing more than a primary acknowledgment that the money has been paid, or as Littledale, J., said in the same case, it is not an estoppel, and amounts to nothing more than a parol declaration of payment. In *Graves v. Key*, 1 B. & Ald. 313, 318, where the holder of a bill had written on it a receipt in general terms, and the question was whether the receipt was conclusive evidence that the bill had been satisfied, the following reasons were prepared by the court for delivery: "A receipt is an admission only, and the general rule is that an admission, although evidence against the person who made it, and those claiming under him, is not conclusive evidence, except as to the person who may have been induced by it to alter his condition. *Straton v. Rastal*, 2 T. R. 366; *Wyatt v. Marquis of Hertford*, 3 East, 147; *Herne v. Rogers*, 9 B. & C. 586. A receipt, therefore, may be contradicted or explained, and there is no case, to our knowledge, in which a receipt upon a negotiable instrument has been considered to be an exception to the general rule."

Lord Ellenborough's dictum in *Almer v. George*, 1 Camp. 392, that a receipt in full, where the person who gave it was under no misapprehension and can complain of no fraud or imposition, operates as an estoppel and is binding on him, means, according to Pollock, C. B., in *Bowes v. Foster*, 6 W. R. 257; 2 H. & N. 784, where the receipt in full is given as for a real receipt and discharge. *Almer v. George*, moreover, is distinctly overruled by *Graves v. Key, sup.*, and is not law. As Martin, B., explained in *Bowes v. Foster*, the fact of a release may be pleaded; but a receipt cannot be pleaded in answer to an action, it is only evidence on a plea of payment; and where the defendant is obliged to prove payment, a document not under seal is no bar as against the fact that no payment was made. Thus, the effect of a receipt is destroyed on proof that it was obtained by fraud; (*Farrer v. Hutchinson*, 9 A. & E. 641), or that it forms part of a transaction which was merely colorable (*Bowes v. Foster, sup.*).

DIFFERENCE BETWEEN A RECEIPT AND A RELEASE UNDER SEAL.—GRAND JURIES.

and a receipt indorsed for the purchase-money, although signed by the seller is of no avail in equity if the money be not actually paid (*Coppin v. Coppin*, *sup.*; see *Griffin v. Glowe*, 20 Beav. 61), though the receipt in the body of the deed, being under seal, amounts to an estoppel, and is binding on the parties at law. *Rountree v. Jacob*, 2 Taunt. 141.

The question between the plaintiff and the defendant company in *Lee v. Lancashire and Yorkshire Railway Company*, *sup.*, was, whether the receipt covered future and consequential injuries or not. The receipt was in terms a discharge of the plaintiff's claim in full upon the company, but the plaintiff alleged that he signed it on the express condition that he should not thereby exclude himself from further compensation if his injuries eventually turned out to be more serious than was then anticipated. A receipt, as we have seen, is an admission only, which may be contradicted or explained (*Graves v. Key*, *sup.*), and it was accordingly open to the plaintiff to traverse the plea by denying that he received the money paid him in satisfaction and discharge of his injuries, except the injuries then known; in which case it would be properly left to the jury to say whether or not he received the money in full satisfaction and discharge. But if the plaintiff had given a release under seal in similar terms, and the defendant company had pleaded it, his evidence could not have been received to explain the instrument. In that case, if fraud had been imputed to the defendant company, two courses would have been open to the plaintiff, viz.: either to meet the plea of the release by a replication of fraud at law, or to file a bill charging fraud, and praying that the defendants might be restrained from relying on the plea. Such a bill will lie, although it does not go on to pray for compensation or any other relief (*Stewart v. Great Western Railway Company*, *sup.*), although there is a concurrent remedy at law. But in *Lee v. Lancashire and Yorkshire Railway Company*, *sup.*, fraud was not imputed, and there was no relief in respect of the receipt, which the court could give plaintiff, which he could not equally well obtain at law by rectifying the plea, and adducing evidence to show that the receipt was not intended to exclude him from further compensation.—*Solicitor's Journal*.

GRAND JURIES.

The Grand Jury lately sitting at the Central Criminal Court, impressed with their uselessness, expressed a wish for their own destruction. They made a presentment to the effect that "in our opinion the office we have been called upon to occupy is useless, and ought as speedily as possible to be abolished. We consider that the ends of justice are not served by the presentation of indictments before us, after

the decision of the magistrates who have had the advantage in the hearing of each case of the legal assistance engaged by both parties. The evidence adduced in all the cases shows how carefully the matters are investigated, and the necessary endorsement of a grand jury under the present system appears to involve a reflection on the decision of the magistrates, and a useless sacrifice of valuable time on the part of the jurymen. We, therefore, beg respectfully to express our hope that steps may be speedily be taken to abolish altogether the said office." There can be very little doubt that when a case has once been investigated by a qualified magistrate, a secondary preliminary examination before a grand jury is not much better than a waste of time. And it probably rarely happens in cases coming before the Central Criminal Court that an innocent man is committed for trial through any incompetence or default on the part of the committing magistrate. It will easily be conceived too by any one who read the evidence taken before the House of Commons Select Committee on juries, two or three years ago, as to the constitution of London grand juries, that their investigation of the charges brought before them has not always been of the most searching or intelligent nature. But though we are not disposed to quarrel with the general estimate which the late grand jury form of the value of their own services in reviewing the decisions of magistrates, and though we quite sympathise in their complaint of the loss of time which they have themselves to incur, it does not follow that the case is to be met by the pure and simple abolition of the grand jury without either qualification or the provision of a substitute. It must be remembered that, notwithstanding the Vexatious Indictments Act, indictments may still in many cases be preferred without any preliminary investigation before a magistrate. There are many offences, for instance, to which the Act does not apply at all, and of which an accusation may be brought without any previous investigation; and in such cases it would, we think, be very undesirable that a prosecutor should be able to call upon an accused person to stand his trial before a petty jury without some previous security that there is at least a *prima facie* case against him. Again, prisoners may be and are committed for trial on the verdict of a coroner's jury. And, assuming a coroner and his jury to be as fit a tribunal for investigating charges of crime as a magistrate, it must be remembered that the object and character of the magistrate's inquiry and the coroner's are wholly different. The magistrate examines directly the very question which has afterwards to be tried by the petty jury—the guilt or innocence of the accused person. The coroner inquires generally into the cause of death of the person on whom the inquest is held; the question of guilt or innocence in any particular person arises only incidentally, and the inquiry into the latter question is

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conducted under manifest disadvantages. In case of a committal on the verdict of a coroner's jury it is very desirable that some further preliminary inquiry should intervene before the accused is put upon his trial; and other examples might easily be cited in which something of the kind is equally desirable. While therefore we in the main agree with the London grand jury in their complaints to the existing system, we cannot think that the simple abolition of grand juries is the true remedy. The grand jury, as at present constituted, may not be the best tribunal for the purpose required; but that in many classes of cases such work as grand juries now do ought to be done by some tribunal we cannot doubt.—*The Solicitors' Journal*.

BILLS TO PERPETUATE TESTIMONY.

Re Tayleur, 19 W. R. 462.

The Act for Perpetuating Testimony in Certain Cases (5 & 6 Vict. c. 69) enacts (section 1) that any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, dignity, title, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, shall be entitled to file a bill to perpetuate any testimony which may be material for establishing such claim or right. Before the passing of this Act it was held that the party filing such a bill must have a present estate or interest. The small value of the interest, or the remoteness of the possibility of enjoyment, was not a sufficient objection to the Court's interference, neither was it material whether the estate or interest upon which the interference of the Court was sought, was, in its legal character, vested or contingent (*Lord Dursley v. Fitzhardinge*, 6 Ves. 251). But an expectation, however proximate and valuable, by virtue of which the plaintiff had not a present interest, did not give a title to the Court's assistance. Thus, it was held that the next of kin of a lunatic could not maintain such a bill in the lifetime of the lunatic, for that they had no interest in the property (*Smith v. Attorney-General*, cited 6 Ves. 260), though the lunatic might be intestate and in the most hopeless condition mentally and physically, for the fact that the Court requires them to object or consent in the application of the property does not confer on them an interest in it. By a sort of analogy an heir-apparent cannot have the writ *de ventre inspiciendo* in the lifetime of his ancestor. But it seems that persons so situated may contract upon their expectations, and may perpetuate testimony with reference to the interest so created, though they cannot qualify themselves as to any interest in the subject itself (*Lord Dursley v. Fitzhard*, *sup.*)

In the last-mentioned case it was held that any interest, however slight, was sufficient. But the interest, besides being present, must also be incapable of being destroyed without the consent of the person interested. In *Allan v. Allan* (15 Ves. 180), a demurrer was allowed to a bill by issue inheritable under an entail, on the ground that they were at the mercy of the tenant in tail in possession; and in the leading case of *Earl of Belfast v. Chichester* (2 Jac. & W. 489), a demurrer was allowed to a bill by the eldest son of a peer for the purpose of perpetuating evidence of his father's marriage, on the ground that a peerage is capable of alienation by forfeiture, and that, although virtually granted in remainder, the person in remainder is never supposed to have any present interest. Lord Eldon suggested a doubt whether the Court had jurisdiction to entertain a bill filed to perpetuate testimony in support of a claim to a dignity, and advised an appeal to the House of Lords from his decision allowing the demurrer. It appears (Hubback on Successions, p. 110 n.) that the plaintiff never did appeal, but obtained a private act to remove the doubt as to his legitimacy. The doubt as to the competency of the Court to entertain the bill when the question was as to the right to succeed to a dignity was removed by statute 5 & 6 Vict. c. 69.

In *Re Tayleur* it was in contemplation to institute a suit to perpetuate testimony as to the validity of two wills made by the lunatic. The Lord Justices, in ordering that such costs as the Master in Lunacy might think proper of the suit, if instituted, might be paid out of the lunatic's estate, avoided expressing any opinion as to whether the bill, if filed, would be demurrable. Before the passing of the Act such a bill would have been clearly demurrable, for the devisee under the will of a living person can be no better off as to present interest than the next of kin of an intestate living person (*Smith v. Attorney-General*, *sup.*). Whether, since the passing of the Act, such a bill will lie has not been decided. The Act is intended to extend the means of perpetuating testimony in certain cases (in what cases is not stated). Remedial Acts are in general to be construed liberally; yet we have it on the authority of the Lord Chancellor (*Campbell v. Earl of Dalhousie*, L.R. 1 Sc. App. 462), that proceedings under this Act ought to be jealously watched. Upon the whole, it seems very doubtful whether such a bill would lie as it was proposed to file in *Re Tayleur*. Before the Act the bill would not have been demurrable.—*Solicitor's Journal*.

It is no reason for a new trial in a case of felony that the reasons of the absence of a witness, who should have been present, were investigated while the jurors who were to try the case were in the court room.—*U. S. Reports*.

Election Case.]

STORMONT ELECTION PETITION.

[Election Case.]

CANADA REPORTS.

ONTARIO.

ELECTION CASES.

(Reported for the LAW JOURNAL by RUSK HARRIS, Esq.,
Barrister-at-Law.)

STORMONT ELECTION PETITION.

Petition—Practice—Writ of Election—Qualification—Mistake in entry of votes on the Roll—Recriminatory Charges—Scrutiny—Aliens.

- 1.—*Held*, that the writ of Election and Return need not be produced or proved before any evidence of the election is given.
- 2.—On a scrutiny the practice in the English cases is for the person in a minority to first place himself in a majority, and then the person thus placed in a minority to strike off his opponent's votes, and the same practice followed in this case.
- 3.—The name of a voter being on the poll-book is *prima facie* evidence of his right to vote. The party attacking the vote may either call the voter, or offer any other evidence he has on the subject.
- 4.—A voter being duly qualified in other respects, and by mistake having his name on the roll and list, but entered as tenant instead of owner or occupant, or *vice versa*: *held*, not disfranchised merely because his name is entered under one head instead of another.
- 5.—The only question as to the qualification of a voter settled by the Court of Revision under the Assessment Act, is the one of value.—*George N. Stewart's vote.*
- 6.—Where father and son live together on the father's farm, and the father is in fact the principal to whom money is paid, and who distributes it, and the son has no agreement binding on the father to compel him to give the son a share of the proceeds of the farm, or to cultivate a share of the land, and the son merely receives what the father's sense of justice dictates: *held*, the son has no vote.—*Wm. P. Eamon's vote.*
- 7.—In a milling business where the agreement between the father and the son was, that if the son would take charge of the mill, and manage the business, he should have a share of the profits, and the son, in fact, solely managed the business, keeping possession of the mill, and applying a portion of the proceeds to his own use: *held*, that the son had such an interest in the business, and, while the business lasted, such an interest in the land as entitled him to vote.—*Robert Bullock's vote.*
- 8.—Where a certain occupancy was proved on the part of the son distinct from that of the father, but no agreement to entitle the son to a share of the profits, and the son merely worked with the rest of the family for their common benefit: *held*, that although the son was not merely assessed for the real, but the personal property on the place (his title to the latter being on the same footing as the former), he was not entitled to vote.—*John Renner's vote.*
- 9.—Where the objection taken was, that the voter was not at the time of the final revision of the Assessment Roll the *bona fide* owner, occupant or tenant of the property in respect of which he voted, and the evidence showed a joint occupancy on the part of the voter and his father on land rated at \$240: *held*, that the notice given did not point to the objection that if the parties were joint occupants, they were insufficiently rated.—*Queen Baker's vote.*
[The learned C. J. intimated that if the objection had been properly taken, or if the counsel for petitioner (whose interest it was to sustain the vote) had stated that he was not prejudiced by the form of the objection, he would have held the vote bad. See as to this judgment, the case of *Duncan Cahey*, post.]
- 10.—Where the father had made a will in his son's favor, and told the son he would work the place and support the family, he would give it to him, and the entire management remained in the son's hands from that time, the property being assessed in both names—the profits to be applied to pay the debt due on the place: *held*, that as the understanding was that the son worked the place for the support of the family, and beyond that for the benefit of the estate, which he expected to possess under his father's will, and that he did not hold immediately to his own use and benefit, and was not entitled to vote.—*Joshua Weert's vote.*
- 11.—Where the voter had only received a deed of the property on which he voted on the 16th August, 1870, but previous to that date had been assessed for, and paid taxes on the place, but not owning it: *held*, that not possessing the qualification at the time he was assessed, or at the final revision of the roll, he was not entitled to vote.—*Duncan Cahey's vote.*
[A question being raised in this case as to the sufficiency of the notice of objection, that the voter was not actually and *bona fide* the owner, tenant or occupant of real property within the meaning of Sec. 5 of the Election Law of 1868, the learned C. J. remarked, "The respondent's counsel does not say that he is prejudiced by the way in which the objection is taken, if he had, I would postpone the consideration of the case. It is objected that the case of Owen Zaker should be subject to the same rule, and if the question had been presented to me in that view, I think I should have felt at liberty to go into the case, giving time to the petitioner to make further inquiries, if he thought proper."]
- 12.—Where the voter had been originally, before 1865 or 1866, put upon the Assessment Roll merely to give him a vote, but by a subsequent arrangement with his father, made in 1865 or 1866, he was to support the father, and apply the rest of the proceeds to his own support: *held*, that if he had been put on originally merely for the purpose of giving a vote, and that was the vote questioned, it would have been bad, but being continued several years after he really became the occupant for his own benefit, he was entitled to vote, though originally the assessment began in his name merely to qualify him.—*Benjamin Gore's vote.*
- 13.—Where the voter was the equitable owner, the deed being taken in the father's name, but the son furnishing the money, the father in occupation with the assent of his son, and the proceeds not divided: *held*, that being the equitable owner, notwithstanding the deed to the father, he had the right to vote. *Held*, also, that being rated as tenant instead of owner did not affect his vote.—*Donald Blair's vote.*
- 14.—Where the voter and his son leased certain property, and the lease was drawn in the son's name alone, and when the crops were reaped the son claimed they belonged to him solely, the voter owning other property, but being assessed for this only and voting on it: *held*, that although he was on the roll and had the necessary qualification, but not assessed for it, he was not entitled to vote.—*Samuel Hill's vote.*
- 15.—Where the voter was the tenant of certain property belonging to his father-in-law, and before the expiration of his tenancy, the father-in-law, with the consent of the voter (the latter being a witness to the lease), leased the property to another, the voter's lease not expiring until November, and the new lease being made on the 28th March, 1870: *held*, that after the surrender by the lease to which he was a subscribing witness, he ceased to be a tenant on the 28th of March, 1870, and that to entitle him to vote, he must have the qualification at the time of the final revision of the assessment roll, though not necessarily at the time he voted, so long as he was still a resident of the electoral division.—*Joshua Rupert's vote.*
- 16.—Where a verbal agreement was made between the voter and his father in January, 1870, and on this agreement the voter from that time had exercised control, and took the proceeds to his own use, although the deed was not executed until September following: *held*, entitled to vote.—*Wm. J. Gollinger's vote.*
- 17.—Where the voter was born in the United States, both his parents being British-born subjects, his father and grandfather being U. E. Loyalists and the voter residing nearly all his life in Canada: *held*, entitled to vote.—*Wm. Place's vote.*
[Richards, C. J., June 12, 13, 14, 15, 16, 17, 1871.]

The following was the form of the petition in this case:—

IN THE QUEEN'S BENCH.

The "Controverted Elections Act of 1871."

Election for the County of Stormont, holden on the fourteenth and twenty-first days of March, in the year of our Lord one thousand eight hundred and seventy-one.

The Petition of James Bethune, of the Town of Cornwall, in the County of Stormont, at

Election Case.]

STORMONT ELECTION PETITION.

[Election Case.

present in the City of Toronto, in the County of York, esquire, whose name is subscribed.

1. Your petitioner was a candidate at the above election, and claims to have a right to be returned at the above election.

2. Your petitioner states that the election was holden on the fourteenth and twenty-first days of March, in the year of our Lord one thousand eight hundred and seventy-one, when William Colquhoun and your petitioner were candidates, and the Returning Officer has returned the said William Colquhoun as being duly elected.

3. And your petitioner says that the votes of divers persons, being within the age of twenty-one years, were tendered to and received, and recorded, or caused to be recorded, by the Deputy Returning Officers at the various polling places within the townships comprising the said county, at the said election, for and on behalf of the said William Colquhoun at the said election.

4. And your petitioner says further, that the votes of divers persons, not being subjects of her Majesty by birth or by naturalization, were tendered to and received, and recorded, or caused to be recorded, by the Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

5. And your petitioner says further, that the votes of divers persons, not being at the time of the last final revision and correction of the assessment rolls for the respective townships in which the said persons respectively voted, being the respective rolls on which the voters' lists for the said election were respectively based, actually and *bond fide* the owners, tenants, or occupants of the real property in respect of which they were respectively entered on the said respective rolls, were tendered to and received, and recorded, or caused to be recorded, by the several Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

6. And your petitioner says further, that the votes of divers persons, not being at the time of the last final revision and correction of the assessment rolls for the respective townships in which the said persons respectively voted, being the respective rolls on which the voters' lists for the said election were respectively based, actually and *bond fide* the owners of the real property, in respect of which they were respectively entered on the said respective rolls, were tendered to and received, and recorded, or caused to be recorded, by the Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

7. And your petitioner says further, that the votes of divers persons, not being at the time of the last final revision and correction of the assessment rolls for the respective townships in which the said persons respectively voted, being the respective rolls on which the voters' lists for the said election were respectively based, actually and *bond fide* the tenants of the real property in respect of which they were respectively entered on the said respective rolls, were tendered to

and received, and recorded, or caused to be recorded, by the Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

8. And your petitioner says further, that the votes of divers persons, not being at the time of the last final revision and correction of the assessment rolls for the respective townships in which the said persons respectively voted, being the respective rolls on which the voters' lists for the said election were respectively based, actually and *bond fide* the occupants of the real property in respect of which they were respectively entered on the said respective rolls, were tendered to and received, and recorded, or caused to be recorded, by the Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

9. And your petitioner says further, that the votes of divers persons not duly registered or entered on the then last revised and certified list of voters for the said county, according to the provisions of "The Election law of 1868," were tendered to and received, and recorded, or caused to be recorded, by the several Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

10. And your petitioner says further, that the votes of divers persons who had respectively previously voted at the said election, were tendered to and received, and recorded, or caused to be recorded, by the several Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

11. And your petitioner says further, that the votes of divers persons who had respectively been guilty of bribery, and of divers persons who had respectively been bribed within the meaning of "The Election law of 1868," were tendered to and received, and recorded, or caused to be recorded, by the several Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

12. And your petitioner says further, that the votes of divers persons who had respectively been guilty of corrupt practices within the meaning of "The Controverted Elections Act of 1871," were tendered to and received, and recorded, or caused to be recorded, by the several Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

13. And your petitioner says further, that the votes of divers persons who were not by law entitled to vote at the said election, were tendered to and received, and recorded, or caused to be recorded, by the several Deputy Returning Officers aforesaid, at the polling places aforesaid, for and on behalf of the said William Colquhoun at the said election.

14. And your petitioner says further, that if the said votes of the said persons respectively mentioned and referred to in the foregoing paragraphs of this petition as having respectively illegally voted for the said William Colquhoun at the said election, had not been received or re-

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recorded for or on behalf of the said William Colquhoun, the number of votes taken and recorded at the said election for and on behalf of your petitioner would have exceeded the number taken and recorded for the said William Colquhoun at the said election.

16. And your petitioner says further, that a greater number of persons legally entitled to vote at the said election voted for your petitioner than for the said William Colquhoun.

16. Wherefore your petitioner prays that it may be determined that the said William Colquhoun was not duly elected or returned, and that your petitioner was duly elected, and ought to have been returned.

(Signed) JAMES BETHUNE.

The particulars of the petition showed that 159 votes were objected to, on the ground that the voter was not the owner, tenant, or occupant of real property within the meaning of section 5 of the Election Law of 1868, 17 votes of aliens, 7 under 21 years of age, 11 of voters unduly influenced, intimidated and compelled, 45 of bribery within the meaning of section 68 of the Election Law of 1868, 45 of bribery within the meaning of section 67 of the Election Law of 1868, 3 of personation, 44 of corrupt practices within the meaning of section 8 of the Controverted Elections Act of 1871, and 8 of unduly influencing, intimidating, and compelling voters to vote for respondent and against petitioner.

The respondent gave notice, that under section 56 of the Controverted Elections Act of 1871, he intended to give evidence that the election of the petitioner was undue, and assigned bribery by petitioner and his agents, undue influence, intimidation, corrupt practices, treating, providing entertainment, &c.

On behalf of the respondent, the particulars showed 6 cases of voters under the age of 21 years, 14 of aliens, 119 of bribery and undue influence, 18 not on last revised assessment roll sufficient to qualify, 5 at the time they voted not owners or tenants respectively of the property in respect of which they voted, 114 not at the time of the final revision of the assessment roll in which their names appear, the *bona fide* owners, occupants or tenants respectively of the property in respect of which they were assessed and voted, 2 disqualified by reason of their being employed and paid for their services at the election.

The respondent also gave full particulars under his notice, objecting to the return of the petitioner pursuant to section 56 of the Controverted Election Act of 1871.

Harrison, Q. C., and Bethune appeared for the petitioner.

J. H. Cameron, Q. C., and D. B. McLennan for the respondent.

Harrison, Q. C., in opening the case for the petitioner, stated that he intended going into the question of scrutiny first, and proposed to follow the practice of the English cases, viz: for the person in a minority to first place himself in a majority, then the person thus placed in a minority to strike off his opponent's votes.

RICHARDS, C. J.—We had better follow the same practice here.

The petitioner having placed himself in a majority, the respondent struck off a sufficient number of votes to place him in the same position as when he commenced.

Cameron, Q. C., took the objection, that the writ of election was necessary before any evidence of the election could be given, and that the writ and return should be produced.

Harrison, Q. C., replied, and cited the *Coventry case*, 20 L. T. N. S. 406, where Willes, J., was reported to have said, "I shall not require the election to be proved in any of these cases. The poll books are here, and they tell me an election was held."

RICHARDS, C. J.—I consider the proceedings somewhat analogous to an interpleader issue. The matter is sent down here now to be tried, and it seems to me that after a petition has been presented asserting an election and return, and parties have appeared demanding particulars, &c., and have themselves made recriminatory charges, and delivered lists of votes objected to, it would be very inconsistent now to assume that there had not been an election and return. If it were so, we should probably have had an appeal long ere this showing that fact. I think the *dictum* of Willes, J., in the *Coventry case* reasonable, and it ought to be followed.

Harrison, Q. C., then urged that the respondent should first dispose of the recriminatory charges of bribery.

Cameron, Q. C., stated that as to the recriminatory charges, there were only three which affected the petitioner's *status* under the statute, and as to them, he was not prepared to go on; as to the others, that they did not charge personal knowledge of the corrupt practices by the petitioner, and in his opinion there must be personal participation in the corrupt practice by the petitioner to disqualify him.

RICHARDS, C. J.—I do not think he ought to be compelled to go on with the first three now.

Harrison, Q. C., contended that the onus of proving a qualification was thrown on the voter, or on the party who wishes to sustain the vote.

RICHARDS, C. J.—I think the vote being on the poll book is *prima facie* evidence of his right to vote. If the party objecting to it resolves to attack it, he may call the voter if he please, or give any other evidence he has on the subject.

Counsel on both sides then requested the ruling of the Court on the question of a voter, properly qualified, but who by mistake was entered on the roll as tenant, instead of owner or occupant, or *vice versa*.

RICHARDS, C. J.—The *rota* Judges have determined to hold that when a voter is duly qualified in other respects, and his name is on the roll and list, but is by mistake entered as tenant instead of owner or occupant, or *vice versa*, he, really having the qualification, is not disfranchised, merely because his name is entered under one of the heads, instead of under another.

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The petitioner now proceeded with his scrutiny:

Gilbert Stewart was called to attack the vote of George N. Stewart. It appeared by the evidence that the witness was the owner of Lot 6, in the

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township of Osnabruck, and 4 or 5 acres of Lot 7, for the latter of which George N., his son, the voter, was assessed. The son had been assessed on this for 3 or 4 years. The taxes were paid the same as the rest of the taxes on the place. The son had no more interest in these 4 or 5 acres than in the rest of the farm. He was accustomed to use what he required for necessities, clothing, &c., but did not own anything as of right on the farm.

Cameron, Q. C., contended that under the Assessment Law, the voters list is final as to qualification, and cited 32 Vic. chap. 21 sec. 10.

RICHARDS, C. J.—The *rota* Judges have had this question under consideration, and have arrived at the conclusion that under the statute the only question of qualification which was considered settled by the Court of Revision, was the one of value. The others are open for investigation on a scrutiny. Vote held bad.

Joseph Eamon (called to attack the vote of *Wm P. Eamon*).—"I live in Osnabruck. I live on the East $\frac{1}{2}$ of 7 and West $\frac{1}{2}$ of 6 in that concession. I have lived there about 23 years. I own the land. *Wm. P. Eamon* is my son. We have possession. He lives in the same house with me, a member of the family. He makes his living off it. I gave him a privilege of half what we raise—the bargain is verbal. It has been going on that way for some years. There was no bargain in particular made about it. Never made division of the crop, except when sold. I gave him more than half of it. There never was any bargain made between us. He is the only son I have. I expect him to have the place after I die. He has a family. There is no distinct share agreed on between us. He, when the grain is sold, gets better than half of the money. I gave it to him, because he does more than half the work. I allow him to give in 50 acres of the land. He has no title of it. That is not cultivated any different from the rest. He does the chief part of the work. We paid the taxes and did the road work between us. I allowed him to give in the 50 acres to satisfy him. I don't know if it was to give him a vote—it might have been. I don't recollect its being talked over for that purpose. The house and barn on that part I gave in myself. The grain is all put in the same barn—used at the same time. My son has three children. I have my son and a daughter. He has always lived with me. I told him when he was married, he could bring his wife there, and remain with me. He expects, of course, to get all my property. This arrangement continued since he was married. He has a part of the house considered his own, but we all eat together. When anything is sold he receives a part of it. The practice has grown up between us since he was married, to give him a share of the proceeds, and that has taken place every year since he was married. He still hands me the money, and I give him his portion. Sometimes it amounts to more than others, according to what he sells. He manages the whole farm for me. I have been in the habit of considering him as jointly in occupation of the farm.

Cross-examined.—His proportion is more or less—as the grain will sell. We can't divide the

grain—we divide the money. I generally give him more than half. He has got half ever since he was married. We keep no accounts. I just handed him what I had a mind to, and that was the only arrangement, and he was satisfied. He had no writing to him made out. If he was not satisfied with what I gave him, he could not compel me to give him any more. I did not intend to make any arrangement with him so that he could compel me to give him any share. If we should at any time disagree, I could turn him out at any time. He has no right to remain there. I am master myself."

Cameron, Q. C., contended that the vote was good, and cited the Assessment Act of 1868-9 sec. 27, Election Act 1868-9 sec. 5 sub. sec. 2, followed by the interpretation of the term "occupant" sec. 6 sub. sec. 2.

It appeared in this case that the assessment roll showed both father and son rated for the land—two quarter lots. On the voter's list the father is rated for one quarter, the son for the other.

RICHARDS, C. J.—The rule applicable to this case, and which I think is in accordance with the view of the *rota* judges, is that when the father and son live together on the father's farm, and the father being in fact the principal, as in this case, to whom moneys are paid over, and who distributes them as he thinks proper, and the son has no agreement or understanding binding on the father, either to compel him to give him a share of the proceeds of the farm, or to allow him to cultivate a share of the land, and he merely receives what he gets from the father's sense of justice and right, that then the son has not such an interest as qualifies him to vote under the election law.

Robert Knight Bullock (called to attack the vote of *Robert Bullock*).—"Robt. Bullock is my son. I own lot No. 8 in 1st Con., Osnabruck. I have owned it 30 years and upwards. I have been in possession of it, and am still in possession of it. My son Robert was born on the land. He has not always been there with me. He has been with me the last four years. He occupies the mill on the west part of the lot. I own the mill. My son runs the mill for his benefit and mine. There is only a verbal agreement between us about it. It was made four years ago. The agreement was that he should have a fair proportion—whatever was considered as fair. I think the agreement was made in presence of the whole of the family. He keeps the accounts. We have never had a settlement. He had all he required. He charged himself with what he took. Cannot say what he charged himself the last four years. He handed over the proceeds every week, save what he kept for himself, to his mother or me. He is a miller—runs the mill. The business is carried on in my name and his. The invoices are generally made out in the name of R. K. Bullock. I have seen some made out in his name. He lives at my house, with the rest of the family. The agreement was to last as long as it suited him and me. I think he has kept more than was reasonable to clothe him and furnish pocket money. We have had losses in the business. He gave no money towards them, but was more moderate in what he drew. He is not married.

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I cannot tell what he got in any one year. He was to have a liberal allowance, having charge of the mill—more than most young men.

Cross-examined.—It is a grist mill, with three run of stones; he has no wages; he runs this mill jointly with me, and has done so for four years. I could not put him out of the mill as I thought proper. I have had no settlement with my son as to our transactions. He will be 28 next birthday. I thought him entitled to a good liberal allowance—once or twice I thought he drew more than required for the business we were doing just then. Sometimes the profit was very small. He is a miller—understands the trade. I presume there would be some trouble in putting him out of the mill—some time to give him notice. The understanding between us was, when he returned from the West, if he would stay, he would have a good liberal allowance for his work. There was a man employed about the mill at so much a month; he was paid in cash; Robert hired him; he took what he chose; sometimes I presume what he took was more than sufficient for his ordinary expenses. The share he took would amount to more than £50 a year. He was differently situated from my other sons. He did all the collecting of the debts; is still there on the same terms. Before he took charge this was rated in my name. Immediately after he came there we made the arrangement; there was a change. I think he sent the money for the taxes. I know I did not. I am not there a great deal: he is, and he attends to those things. He does not get \$300 in cash from the mill—not much less than \$200. He boards at home. I have a first-class miller at \$500 a year and the house, and they board themselves.

Re-examined.—I have bought some of his clothing since he came back. I did not charge him with it; sometimes he pays for it, sometimes not. I have paid for a good share of his clothing for the last four years. When he wants to go away from home, and the horses are there, he generally takes one. I am certain he took more than \$100 in cash in each year for the last year or two."

RICHARDS, C. J.—I think in this case the original agreement between the parties shows an intention to give the son something more than a mere gratuity such as the father might choose to allow him. The father says he told him if he would stay at home and take charge of the mill, he would give him a share of the profits; no specific share was agreed on, and the son took out of the proceeds what he thought right: the father sometimes thought it too much, but did not mention this to the son; did not close the business or the connection. I think here the son had something more than a sum of money out of the premises at the will of the father; he was entitled to a share; had an interest in the business, and, as such, while the business lasted, an interest in the land, and was at all events a partner in the profits, and might be considered as having an interest in the land. Bullock says, I understood we were to be partners in the milling business under this arrangement, and he was to have a fair proportion of the profits."

I therefore think this vote good.

John Raney, the voter called as to his own vote—"I voted in Stormont as the owner of the east half of twenty-five, in the third concession, Roxborough. My father owns it. I have no title or lease of it. I live on it. Have lived on it eighteen or twenty years. Father lives on it with me. We both live in the same house. I was married about two years ago. Father has told me he would give it to me. He has offered me a deed of half the lot. Mother is dead. I have a sister living. My sister managed the household until I was married. My father is about seventy. I always remained there with him. I thought he would give it to me. No writing between us. I have remained in the expectation of getting the whole when he dies.

Cross-examined.—My father is not able to work. We live together. He said he would give me a deed of half at any time and that the whole place was for me. My brother left five years since or more. He is younger than I. There are a hundred acres in the lot, thirty-five or forty acres cleared. I sell if I am there, he sells if he is there. I do pretty much all the business. When he sells grain he gets the money. I am relying on what he said to me in staying with him. It has been assessed to me eight or nine years. Sometimes my father and sometimes I myself give it in. Father pays if he is there when the assessor comes; and when I am there I pay. I keep the store account in my name and pay the necessities for the house. He directs the place to be assessed in my name. I don't know who is master of the house. We are both there. He built it. I consider I ought to obey his orders as a son ought to do towards his parent. I tell him what I do with regard to the business of the place. One of the horses I bought this winter I claim. My sister and sister's daughter claim most of the horned cattle. When I sell anything I consult him if he is there; if not there I sell and tell him. The cattle are assessed in my name—everything. My father when able gets about and sees to odd things about the house but can do no hard work. I consider it my duty to consult him about what I sell. If he was about to assist a neighbour and consulted me about it, I don't think I would be justified in objecting to his doing so. I consider him the owner of the place. Before I was married we were living together. I would give in he was boss of the house. My sister was also living there, and also a niece of mine seventeen or eighteen years of age."

Harrison, Q.C., contended that the voter has a right to enforce specific performance of the agreement with his father, and cited *McDonald v. Rose*, 17 Grant.

RICHARDS, C. J.—This case has much in it to shew a kind of occupancy distinct from the father, and if the father had received from him a certain share, or he himself a certain share, or there had been any agreement between them, either expressed or implied, that he should receive the profits of the place, and the father lived with him, it might have been different. But the case seems to me, to be really that of a man and some of his unmarried children, and grandchildren living together, *en famille*, the hard work being done by the younger branches who

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are able to work, the old man not being able to do so, but in fact, being the head of the family nevertheless. It is true the place is assessed in the name of the son, but so were the cattle and other loose property, as I understand from the witness, and he did not claim to own them. On the whole I think this vote bad.

Owen Baker, the voter, was called as to his own vote.—The evidence in this case was very similar to that in the case of *Robert Bullock*.

It appeared on the evidence of the voter that he and his elder brother had entered into an agreement with their father, that they were to carry on his (the father's) mercantile business in the village of Aultsville for three years, the sons to leave the business at the expiration of that time in as good condition as when they commenced—the sons to have all the profit. Shortly after the agreement the elder brother left the country, and the voter continued to carry on the business with the aid of his father. The voter was assessed on ten acres of the farm (one hundred acres) which was managed in the same manner as the mercantile part of the concern.

The books were kept and purchases made in the father's name, who could also sell what he pleased out of the concern or the produce of the farm.

On cross-examination he stated that he thought his father could not compel him to leave, if he was unwilling, before the expiration of the three years. When the agreement was entered into stock was taken. The son could sell a team if he thought fit without speaking to his father about it, could sell stock as he pleased and appropriate the money. The ten acres was worth about \$30 an acre.

To attack the same vote *Simeon Baker* was called. The witness was the father of the voter *Owen Baker*. The assessment on the roll for the son was ten acres, value \$240. He was entered as freeholder. Was not certain if he gave it in, as occupant. No one lived on the farm, but the son worked it. Had promised the interest of it for three years. The understanding with the son was he was to keep it as good as when they started. Would consider it wrong to take \$20 out of the produce of the farm, but could do it if he thought proper. Could buy and sell in the store, but could not say that he could take anything without the son's leave. The ten acres was considered sufficient rating to give the son a vote. There was no agreement in writing as to the land or anything else.

On cross-examination this witness stated that the object in making the arrangement was to benefit the son. He was working in *Matilda*, and the witness wanted him and his brother at home. They thought of going West, which he, the father, did not desire. They took up the business on the arrangement that they were to have all the profits for three years—the stock to be returned to witness as good as when they commenced—the personal expenses of the witness to be the same as the rest of the family.

Cameron, Q. C., objected that the voter had no interest in the land. He was not a joint occupant with the father; and if he were, the assess-

ment was not sufficient in amount to qualify for both: Election Act, 1868-9, sec. 5, sub-sec. 2.

RICHARDS, C. J.—I consider the father and the son have a substantial interest in the business and its proceeds, and in the proceeds of the farm, and in the land; but perhaps not strictly a term. I think the interest the son has is in the nature of a joint one with the father.

Harrison Q. C., contended that the objection taken to this vote does not touch the point. The objection is in schedule No. 6.

(Form of objection in the schedule referred to: "List of voters who voted for the petitioner at the said election, objected to on the ground that they were not, at the time of the final revision of the assessment roll in which their names appear, and on which the respective voters' lists were based, the *bond fide* owners, occupants, or tenants respectively of the property in respect of which they were assessed and voted.")

Cameron, Q. C., said that the objection came fairly up, under the objection that he is not a *bond fide* owner, occupant, or tenant of the property in respect of which they were assessed and voted. This means that he was not assessed to the value to qualify him: see *Wolferston*, p. 98.

RICHARDS, C. J.—I do not consider that the notice as given points to the objection, that if the parties were joint occupants, they were insufficiently rated to qualify the voter. I therefore hold this vote good, on the ground that the objection taken does not point to the real difficulty, viz., the joint interest being insufficient.

The learned Chief Justice intimated that if the objection had been properly taken, or if the counsel for the petitioner (whose interest it was to sustain the vote) had stated that he was not prejudiced by the form of the objection, he would have held the vote bad.*

Joshua Weert—called as to his own vote.

"I live on part of 16 in 7th Concession of *Osnabruk*; my father lives with me. I have no lease or deed. He made his will to me last January. Some seven years ago, my father told me if I would stay and reclaim the place and support him and my mother and my sister, and if I worked the place he would give it to me. I did work the place, but made very little out of it. It was pretty well run down; and so involved, that the loose property would not come near paying the demands. I worked on and made money, and redeemed the place, and father made a will in my favour in January last. I am married; have been four years. My wife and all live together in the same house. I think my father is about 77.

Cross-examined.—I was to have the use of the place in the meantime. From that time I have had the use of the place just as I liked; used it as my own; contracted and paid all debts as my own—I have used the place just as if I had had a deed of it for the last four years. He then became so old that he could not assist me. He has not been able to do anything of any value. I bought and sold stock on my own responsibility. There was some stock on the place when I went on; it was understood it was

* See judgment in case of *Duncan Cahay*.

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to be mine if I paid off the debts. I have paid off between four and five hundred dollars. There was a change in matters after that; I became the master there, and he consented to it. My father used to apply to me for money within the last two or three years. I am managing this business as my own, on my own account, and for my benefit, and that is the understanding between us. I presume it is so generally understood in the neighbourhood. It is assessed for four or five years last in the name of myself and my father; the cattle all assessed in his name.

Re-examined—I did this to clear off the place; to get it in the end for myself. That was the motive with which I made the agreement. My father and the family were to have their support in the meantime, and whatever I made was to go to pay off the debts; they are not wholly paid yet. I had confidence in my father that he would will it to me, and did not make any agreement as to what I would have in the event of his not willing it to me."

RICHARDS, C. J.—The arrangement is, in fact, such as shews the use and occupation for the benefit of the estate in paying off the debt. I consider that the real understanding is, that he works for the benefit of the estate, and beyond what is used in supporting the family is to go to that purpose. If he had had a right to it for his own benefit, it would be possessed for his own use and benefit. What he really works for and the profit of the estate goes to is his expected possession of his father's estate under his will. I think this vote bad.

Duncan Cdhey, called by the petitioner as to his own vote.

I live in Roxborough, 1st Con., part of 17 and 18. My father's name is Edward. My father lives on the lot; has lived there 30 years; owns part of it. I own the south part of west half of 17. I have a deed for it; I have it with me: I got it last August, the day it was dated; its date is the 16 August, 1870. I did not own the lot until I got the deed. I had no claim to it before that. I voted at the election; I am called McCahey. I don't own any other property; the property has been assessed in my name for the last 5 or 6 years. My father is over 70. I have generally paid the taxes."

Harrison, Q. C.—This man is not a voter within the meaning of section 5 of the Election Act 1868-9. He is not rated for the lot—if he was, he is not a voter under the section. The true meaning of the section is, that he was so possessed at the time of assessment. See the form of oath to be administered to voter under section 41 of the Act.

Cameron, Q. C., *contra*—There is nothing to show, that the roll might not have been revised after he got his deed—nothing in the 5th section of the Act to declare that the person should have the title, and nothing in the section referred to, to call attention to the particular objection now raised, and it is only by referring to the oath that the point comes up.

Harrison in reply—The statute only permitted appeals to 15th July under the Assessment Act, 32 Vic. cap. 86, section 63, sub-section 6. The general form of objection was sufficient: if the parties thought it not sufficiently specified,

they should have demanded better or further particulars.

RICHARDS, C. J.—I think this vote bad, because he did not possess the qualification at the time he was assessed, or before the final revision of the roll. The respondent's counsel does not say that he is prejudiced by the way in which the objection is taken. If he had been, I should postpone the consideration of the case. It is objected that the case of Owen Baker should be subject to the same rule, and if the question had been presented to me in that view, I think I should have felt at liberty to go into the case, giving time to the petitioner to make further inquiries if he thought proper.

Benjamin Gore, called by the respondent as his own vote.

It appeared by the evidence of the witness, that he lived with his father, and had voted on his, the father's property. His father had made a will in his favor, but he had no title but a verbal agreement with the father. The agreement was made at the time the will was made, about 1865 or 1866. The son was to take the proceeds after supporting his father and himself; did not account to his father for the proceeds. Witness was assessed for 10 acres, value \$250. The assessment was made in his, the witness' name, before the arrangement with the father. It was done to give him a vote. The father paid the taxes before the agreement, the son pays them now.

Cameron, Q. C., contended that the arrangement was a colorable one, merely to give the son a vote. The ten acres was not specially mentioned.

RICHARDS, C. J.—If the name had been put on originally (before 1866) merely for the purpose of giving a vote, and that was the vote questioned, I should probably hold it bad; but being continued after he really became the occupant for his own benefit (since 1866), I cannot say that he is not now properly a voter, even though the name was continued there to enable him to vote. I think the vote good.

James Blair—called to attack the vote of *Donald Blair*:

"I live on the West $\frac{1}{2}$ of Lot 26 in the 6th Con. of Roxborough. I am the father of Donald Blair. He lives with me. He has no written agreement, lease, or instrument. When it was purchased he sent me the money to pay for it, about four years ago, and I took the deed in my own name. He was then in the States, and came back a year after. He is living with me as the other son. He is the oldest. He is not married. By means of that lot he has bought another last spring. He paid only \$300 for the lot. We are all working the place. He has got a deed for 32 in same Concession. Bought it last spring. I own my own place. The N. W. $\frac{1}{4}$ of 26 in the 6th Con. is the lot the boy voted on and which he sent me the money for. My sons and me are working and occupying it since about a year ago. He had not any interest in it beyond this, that his money bought it."

Cross-examined.—I bought lot 26 more than thirty years ago. I bought 25 for Donald. I wrote him I could buy the place for him cheap. I mentioned \$300, if he could send me the money.

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I bought the place about four years ago. Took the deed in my own name, as he was not at home (he is about 27), and when he returned he went to live with me. Neither of us lives on 25. He works it. It all comes in together, and is worked the same as my farm. By the labor and assistance of myself and his brother, we made money which enabled him to buy another place. I consider it his, and it is his. He thought it would be too little to give his vote on the lot he bought, and he was assessed for three years for lot 25. He was assessed the first time the assessor came round after I bought it. The other son is 20. I have three daughters unmarried and two married. My son never asked me for a deed for it, nor did we ever speak of it. Nothing separate from what was raised on 25 for my own. No building now on 25. We all worked on the three lots assisting one another. Before we bought the last lot we all worked on the two, assisting one another. We make no shares. The young boy expects my lot. It is so understood. The homestead is 180 acres with buildings. The oldest son 160 acres—no buildings. The girls are to have the loose property. We are working harmoniously, assisting and aiding each other. It is understood in the neighbourhood that he is the owner."

Cameron, Q.C.—The father is trustee for the son. They are not rated for enough to have them both qualified. And as to the ownership, the father is in possession, and has the profits to his own use, and therefore is literally the owner.

RICHARDS, C. J.—I think the father is in fact the owner, but not in his right as owner in fee, but as occupant with the assent of his son. I think, on this evidence, the son is the equitable owner, and rated as owner, would have a right to vote, notwithstanding the deed to his father, and hold that the mistake in that respect, being rated as tenant instead of owner, does no harm. I therefore for the present hold the vote good, but, if necessary, may reserve it.

Samuel Hill called as to his own vote.

It appeared, on the evidence of the witness, that he and his son had leased certain property. The lease was drawn in the son's name alone, and when he and his son reaped the crops, the son claimed that they belonged to him solely. The witness owned other property, but when the assessor called on him he requested him to assess this particular property to him, and on this he voted.

Harrison, Q.C.—As he was on the roll, and had the necessary qualification, though not assessed for it, the vote should stand.

Cameron, Q.C.—He voted in right of this property, and had it assessed to him in preference to the other by his own desire, and cannot in consequence now claim to vote.

Vote held bad.

Joshua Rupert, called by the petitioner as to his own vote.

It appeared on the evidence of the voter that he voted on part of lot No. 6, eighth concession, Osnabrock. Did not own it; his father-in-law did. Had occupied it for five years, paying rent to his father-in-law. Lease expired in Novem-

ber last. Left it about a year ago—on first of last April. After he left, it was let by his father-in-law, with his consent, to a man named Stewart, for a larger sum than he paid, and the father-in-law paid him the extra rent. Was a witness to the lease to Stewart, which was dated 28th March, 1870.

On cross-examination he said that it was agreed at the time of the lease to Stewart that the father-in-law should pay him, the voter, the increased rent, which he did.

RICHARDS, C. J.—I think after the surrender by the lease, to which he was a subscribing witness, he ceased to be a tenant. I am of opinion that the party must have the interest that qualifies him at the time of the last final revision. If he has it then, though not at the time of the election, he could properly vote if he were still a resident of the electoral division, but not unless he had the interest at the time of the revision of the roll. The roll was completed 80th March, two days after the new lease. I think the vote bad.

George M. Gollinger called to attack the vote of *Wm. J. Gollinger*.

I made a deed to Wm. J. Gollinger of East half 31, fifth concession, Osnabrock. It was made on or about 12th September, 1870. There was a verbal agreement between him and me about 10th or 12th January, 1870. I was to give him the property. He left home and went to Wisconsin a few days before the holidays of 1869. About 10th January I sent him word if he would come back I would give him a deed of this lot. He came back immediately with the person by whom I sent the message. He was not then married. In September I made him the deed. We had some understanding about it before I made the deed. My son William got the proceeds of the place wholly and solely. I never got a fraction of the proceeds of this.

Cross-examined.—We had three farms. We worked together. He was understood he was to have the produce of this farm to himself separately. This was the understanding between us in January, 1870. His share was put by itself, and kept separate from the rest. I worked 100 acres in the 7th concession, and 50 acres in the 4th concession also. Of these he had no share. We lived together at that time in the dwelling on this lot, until I gave him the deed. When I gave him the deed I was to leave. It was his privilege to let me remain. I had no management of this part. I did on the others, but let him do as he liked about this. I think my son was twenty-three years old in May or June. This understanding was not varied in any way after. It was part of the understanding that he was to have control of the place last summer. I suppose he went away because he wanted some property and I would not give it to him, but I changed my mind.

Re-examined.—When he came back the agreement was that if he would stay at home and work the farm, I would give him a deed at any time he chose to ask for it. He would rather I should stay with him and give him a deed, so that he could have control. I would rather have control myself, and so I would not stay there. He was anxious for the deed, and so I gave it to

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him. I thought he would have been willing I should stay there if I would give him the deed. I would prefer to stay elsewhere. I did not have any control. I never wished to stay there from the time I made the verbal bargain. His own hand worked it. I gave him a team, span of horses, for stock farming in September. I promised that in January, and transferred it in September. I told him I would give him seed to sow the place. I promised him no help. I helped him some. He did not pay me for his board, nor did I pay him for the rent of the house. The teams pastured on the place. His lot and mine remained together, not separated by fences. I could not tell how many bushels of grain I gave him that year. He did not promise to work for me. We worked as before—beginning at one field and finishing that, and then at another, and so on, as before; but this was upon an understanding. In September I went to a lot I had in the 7th concession. He remained on the lot. I gave him the deed and property I promised him, and the cattle, and I went to the 7th concession. Until he got the deed it was understood he was to go and work the farm—the east half of 81—if he should think proper. I was to give him a span of horses, waggon, barrow, four cows, six sheep, four hogs, and two pigs, and he was to have one half of the house furniture. He was to have these at any time he wanted. This was to be done at the same time with the deed, and at the time of the deed I did give them to him. He went on then under these terms, and went to work. He never said he wanted them until September. He took possession of them in January—of the horses and cattle, and these things. We never drove them off. I pointed out the four cows and the horses, and he took possession of them then. He was to get six sheep out of the flock. He was to have four of the hogs in the fall. He attended to these horses himself, and my son to the other team. He groomed and fed them as his own. I said to him in the spring, if he would help us to put in a crop in the other land, we would help him. He agreed to do so, and we went and did it. There is only one barn on 81. It was on his part. There were no crops on mine. The stuff was put into the barn on the place as before. He took control of it after, and used it. I had nothing to do with it after. I did not take anything off the place since or before."

RICHARDS, C.J.—I think this vote good, according to the rule we have acted on.*

William Place, (class 2 "Aliens"), called as to his own vote. It appeared from the evidence of the witness that he was informed by his mother he was born in Ogdensburgh, in the United States. Both father and mother were born in Canada. He left Ogdensburgh when he was nine months old, came to Canada, and had resided in Canada ever since.

F. H. Shaver called as to same vote.—Witness was a cousin of the voter. Knew him and his family. The voter's grandfather came originally from the United States. Drew land from Government, as did also voter's father as a U. E. Loyalist. Understand that the voter was born

in Ogdensburgh. The father of the voter moved to Ogdensburgh about three months before the voter was born.

RICHARDS, C.J., thinks the vote is good.

[The trial of this petition was adjourned until Monday, the 12th of September next.]

** The following points arising on Scrutiny, were also decided in Brockville Election Petition, tried by the Chief Justice of the Common Pleas, and may be conveniently referred to in this place.*

1. Any error in assessing as owner, tenant or occupant, is immaterial if the voter be qualified in any of these characters.

If a man be duly assessed for a named property on the roll, even though there was a clerical error in describing such property in the voter's list, or erroneously setting down another property on the voter's list, if no question or difficulty arose at the poll as to the taking the oath, the vote will not be struck off on a scrutiny.

When a voter, properly assessed, who was accidentally omitted from the voter's list for polling sub-division No. 1, where his property lay, and entered in the voter's list for sub-division No. 2, voted without question in No. 1, though not on the list—vote held good.

Quære, even if accidentally omitted from voters' list, should vote be received? of course if questioned at the poll, it could not have been received, not being on the voters list.

When it is proved that an agreement exists (verbal or otherwise), that the son should have one-third or one-half the crops at his own, and such agreement is *bona fide* acted on, son being duly assessed—vote held good—the ordinary test being, had the voter an actual existing interest in the crops growing and grown.

Where it is proved that for some time past the owner has given up the whole management of the farm to his son, retaining his right to be supported from the product of the place, the son dealing with the crops as his own, and disposing of them to his own use—the son's vote held good.

A clearly established course of dealing or conduct for years as to management and disposition of crops, and acts done by son in management of farm, held sufficient to establish an interest in the crops in the son, though the evidence of any original agreement or bargain not clear.

If the evidence would warrant a jury finding the crops (say in the year preceding the last assessment) to be the property of the voter—the vote is good.

No question of actual title is to be entertained. Occupancy to the use and benefit of the occupant being sufficient.

Where the owner died intestate, and the estate descended to several children, only the interest of the actual occupants is generally to be considered. *Quære*:—Unless the occupant be shown to be receiving the rents and profits, and on account of a party interested, though not in actual possession, a mere liability to account is not to be considered.

The widow of an intestate owner continuing to live on the property with her children, who own the estate, and work and manage it, should not, till her dower be assigned, be assessed, nor should any interest of hers be deducted from the whole assessed value, she not having the management of the estate.

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Will—Construction—Whether trust or absolute gift

A testator bequeathed to his wife a freehold house and all his personal property, "to be at her disposal in any way she may think best for the benefit of herself and family."

Held, (affirming the decision of Vice-Chancellor Malins), that this was an absolute gift to the wife.

[19 W. R. 659.]

This was an appeal from a decision of Vice-Chancellor Malins (18 W. R. 972).

By his will dated 18th March, 1833, John Lambe, who was a tradesman carrying on his business at No. 29, Cockspur Street, of which house he owned the freehold, and who was then a man not much advanced in years and having a young family, willed and bequeathed to his wife, Elizabeth Lambe, his said freehold house, and also all his personal property, consisting of stock-in-trade, book debts, and household furniture, and property of every description belonging to him, the whole of the aforesaid property "to be at her disposal in any way she may think best for the benefit of herself and family."

The testator died in 1851, leaving his wife surviving. She, by her will dated the 28th April, 1857, devised her "freehold messuage No. 29 Cockspur Street" to trustees, upon trust for her daughter Elizabeth Eames for her life, subject to and charged with the payment of an annuity of £70 to her grandson, Henry Lambe, during the life of her daughter, and on her death the testatrix directed her trustees to divide the rent between her grandchildren, Henry Lambe and Charles Eames (son of the daughter Elizabeth Eames) in equal shares during their joint lives, and upon the death of either of them she devised the house in fee to the longest liver of them. The testatrix died in January, 1865, and thereupon the daughter Elizabeth Eames entered into possession of the house. The grandson, Henry Lambe, was an illegitimate son of a son of the testator and his wife. He was born during the life of John Lambe, but after the date of his will. This suit was instituted by Henry Lambe against Elizabeth Eames and her husband and the surviving trustees of the will of the testator, to enforce payment of the annuity given to the plaintiff by Elizabeth Lambe's will.

The Vice-Chancellor held that the plaintiff was entitled to his annuity, and Mr. and Mrs. Eames appealed.

Bristowe, Q.C., and *W. Barber* for the appellants.—The gift to the testator's widow is, we contend, an imperative trust, with a discretion only as to the mode of division among a certain class, in which class the plaintiff is not included. It is, in fact, a life estate to the widow with a power of appointment after her death; *Woods v. Woods*, 1 My. & Cr. 401; *Raikes v. Ward*, 1 Hare, 445; *Crockett v. Crockett*, 1 Hare 451, 2 Phil. 553; *Salisbury v. Denton*, 5 W. R. 865, 3 K. & J. 529; *Scott v. Key*, 18 W. R. 1080, 35 Beav. 291; *Godfrey v. Godfrey*, 11 W. R. 554; *Brook v. Brook*, 3 Sm. & G. 280; *Audsley v. Horn*, 8 W. R. 150, 1 De G. F. & J. 226; *Gully v. Cregoe*, 24 Beav. 185; *Shovelton v. Shovelton*,

32 Beav. 148; *Reeves v. Baker*, 2 W. R. 854, 18 Beav. 372. Even if the widow was at liberty to dispose of part or the whole of the capital during her life, still, whatever was left at her death was subject to a trust for her family, a class to which the plaintiff does not belong. As to the meaning of the word "family," they referred to *Lucas v. Goldamid*, 8 W. R. 759, 29 Beav. 657; *Wood v. Wood*, 3 Hare, 65; *Parkinson's Trust*, 1 Sim. N. S. 242; *Griffiths v. Evan*, 5 Beav. 241; *Alexander v. Alexander*, 5 W. R. 28, 2 Jur. N. S. 898, 2 Jarman on Wills (3rd ed.) 82 *et seq.*

In the course of the argument, *M'Leroth v. Bacon*, 5 Ves. 159; *Robinson v. Waddelow*, 8 Sim. 184; *Doe v. Joinville*, 3 East, 172, were also referred to.

Cotton, Q.C., and *Warner* for the plaintiff.—There is no obligation or trust that can be enforced in this Court. That a trust may be enforced there must be a defined property affected and definite objects. Here the property is indefinite, for the widow might clearly have spent any part of it she pleased in her lifetime, and the objects of the trust are not ascertained, for the word "family" is too indefinite. The words which are said to create a trust or obligation are really nothing more than a statement of the testator's motive in making the absolute gift to his wife. He wished that after his death she should occupy his position as head of the family.

They referred to *Morice v. The Bishop of Durham*, 10 Ves. 535; *Knight v. Knight*, 3 Beav. 148; *Green v. Marsden*, 1 W. R. 511, 1 Drew. 646; and also to *Dickenson v. Wright*, 8 W. R. 418, 5 H. & N. 401, 6 H. & N. 849; as showing that a provision for an illegitimate child will support an instrument otherwise voluntary as against a subsequent purchaser for value.

Bristowe, Q.C., in reply, referred to *Smith v. Smith*, 2 Jur. N. S. 967; *Barnes v. Patch*, 8 Ves. 604; *Williams v. Williams*, 1 Sim. N. S. 858.

Heath for the trustees.

JAMES, L.J., was of opinion that the decision of the Vice-Chancellor was perfectly right. If this will had to be construed independently of any authority whatever he thought its meaning would not be open to any reasonable doubt. The will was that of a tradesman who was carrying on business in Cockspur Street. He was when he made it in the prime of life, and had a wife not advanced in years, with a young family. He made his will in these terms:—[His Lordship read them]. The question was whether those words created any trust affecting the property. On hearing case after case cited, which had been referred to, his Lordship could not help feeling that the officious kindness of the Court of Chancery, in interposing trusts in many cases where the testator never intended anything of the sort, must have been a very cruel kindness indeed. In the present case his Lordship was satisfied that the testator would have been shocked had he been told that any one of his infant children could have instituted immediately after his death a suit in this court by a next friend for what was called the administration of the trusts of his will. His Lordship was satisfied that no trust was intended, and that it would have been a violation of the wishes of the testator if his

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wife was to be anything else but his successor in every respect, the head of the family just as he himself had been. Suppose the gift, instead of being to the testator's wife, had been to his three sons, the share of each son to be at his disposal as he should think best for the benefit of himself and his family. In such a case the words would clearly have meant that the testator had not the vanity to think that he himself could deal with his property better than his successors could. And the case appeared equally strong when the gift was made to the widow, who would be the natural successor of the testator with respect to his family. It was, however, said that the question was governed by authority. But the cases cited were in many ways distinguishable from the present case. First of all, there was here an absolute gift to the widow, which must be cut down in some way. It was argued that the difficulty in the way of saying that there was a trust because, before you could say there was a trust the property to be affected must be ascertained, and the nature of the trust defined, existed in the decided cases, and yet the Courts in those cases said that there was some interest in the children, as for instance in *Crockett v. Crockett* though they did not decide what that interest was, and it was urged that the Court might now say that there was an obligation to do something for the children, and that the plaintiff, who was illegitimate, could not be allowed to take anything. But even if there was in this case such an obligation it was impossible to extend it to more than the providing maintenance for the children. It was impossible to say that the words could be construed to mean a trust for the widow for life with remainder after her death to the children, either all of them, or one or more exclusively of the others, in such proportions as the widow might appoint. But if the trust was not that, what was it? Mr. Bristowe said that whatever she did not spend during her lifetime was to be in some way for the benefit of the family. His Lordship did not see how to derive such a meaning as that from the will in the present case. In *Crockett v. Crockett* it was only decided that the children took some interest in the property, and if the widow had in this case honestly satisfied such an obligation his Lordship did not see how more could be required of her. Then it was said that the case of *Godfrey v. Godfrey* was like the present. But there the present Lord-Chancellor, then Vice-Chancellor, did not define what the interest of the children was. He began his judgment by saying that there was clearly a trust; that was the *ratio decidendi* there. It was impossible in the present case to say that there was a trust. In *Godfrey v. Godfrey* the Vice-Chancellor went on to say—"Where there were strong expressions indicating an intention that the devisee or legatee should hold the property free from control, the words denoting a wish, request or recommendation were considered to be controlled, and it was held that no trust was created; but there was no such indication here. The only difficulty arose from the words 'as to her seemeth best;' but it was not necessary to determine now to what extent the children were interested. It might be that those words were merely a direction as to the control and manage-

ment of the property." Therefore that case differed from this unless it could be said that the words used in this will "to be at her disposal in any way she may think best for the benefit of herself and family," implied simply a reasonable discretion in the widow as to the control and management of the property. That, however, would be quite inconsistent with the words of the testator, for it was clear that he intended that she might employ the property and risk it all in the trade. Those were the principal cases relied upon; the other cases cited were only illustrations of the rule; and his Lordship thought that they did not enable the Court to escape from the difficulty which resulted from the indefiniteness of the word "family" in a case where there was given to the woman a general power to do what she pleased with the property. It seemed to his Lordship impossible here to put a restricted meaning upon the word "family;" it might include sons, daughters, sons-in-law, daughters-in-law. The property too, which was to be subject to the supposed trust, was equally indefinite, for it could not be said how much the widow was at liberty to spend in her lifetime. His Lordship was, therefore, of opinion that there was no such trust as the Court could enforce. If there were any obligation at all, he was of opinion that it had been fully satisfied by the widow when she made the will, giving part of the property to one member of her family, and part of it to an illegitimate child of another member of the family whom she might honestly think came within the words of her husband's will. The decision of the Vice-Chancellor was therefore right, and the appeal must be dismissed.

MELLISH, L. J., was of the same opinion. In order to reverse the decision of the Vice-Chancellor, the Court must see that the widow exceeded the authority given to her by the testator. The Court must see what the words used by the testator really meant, and must not be influenced by a desire to find a trust in them, but must see what was the fair construction of the words. And the Court was also entitled to look at the state of his circumstances at the time when he made his will. The will began with an absolute devise to his wife. [His Lordship read the words of the gift.] In the first place, what was the meaning of the property being not, at the disposal of the widow, but "at her will and disposal?" It was clear to his Lordship's mind that the testator meant her to have the power of disposing of the *corpus* of the property as she pleased for the benefit of the family. If unfettered by any decision, his Lordship would have been disposed to hold that the words "to be at her disposal in any way she may think best for the benefit of herself and family," were merely intended to express the testator's object or motive in making the devise to his wife. He had such confidence in her, and he knew that the very best way of disposing of his property might be to commit its distribution to a sensible person. This might be very preferable to creating a trust which might possibly lead to a Chancery suit. His Lordship agreed with his learned brother that it would be a cruel thing to put such a construction upon the words as might entirely defeat the intention of the testator. But to a certain

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extent, no doubt, a difficulty might arise, by reason of the decided cases, in giving to the words "the benefit of herself and family" the meaning which his Lordship would naturally give to them, and it might be that the family would take some interest under the words of the bequest. But what was that interest? It was impossible to give the meaning which Lord Cottenham gave to the words which occurred in *Crockett v. Crockett*—namely, a life estate to the widow, with remainder to the family. If the widow was at liberty to spend the *corpus*, that would be quite inconsistent with her having only a life estate. If she had not a life estate, then the interest of the family would be taken by them as the same time as she took her's, whether it was a joint tenancy, or whatever else it might be called. But the widow was to determine what amount each child was to have, and his Lordship could not see how the Court could execute a trust where a testator said, "I have such confidence in my wife, that I intend that she is to determine how my property is to go." The most the Court could do would be to prevent the widow from giving the whole of the property away from the family, though even for that his Lordship should have thought that the words were too vague. But if that were so, his Lordship could not see how the widow had exceeded the authority given to her, and it was very difficult to see why she might not provide for the illegitimate child, for whom, though he was not a member of the family, it still might be evidently for the interest of the family to provide. With regard, then, to the principal cases cited. In *Woods v. Woods*, the words of the gift were: "I do constitute and make Elizabeth my wife and Thomas Woods my executors whom I do appoint to sell and dispose of all my estates and chattels in such manner and form as they shall jointly agree upon or not to sell if it seems most advisable to keep them or in any way that they shall think proper and that every creditor have his money and if sold all overflush to my wife towards her support and her family if any there be after paying my brother for his trouble and all other debts whatsoever." Until, therefore, the "overflush" was ascertained, no power of disposal by the testator's wife arose at all. In *Crockett v. Crockett* the words were, "my last desire is that all and every part of my property shall be at the disposal of my most true and lawful wife Caroline Crockett for herself and children, in the event of any unforeseen accident happening to myself, which God forbid." The property was to be simply at the disposal of the wife for herself and children; there was no gift to her as in the present case. How then did Lord Cottenham deal with it? He said (2 Phil. 561), "It remains to be considered what are the rights and interests of the widow and children in the fund—a question which, if to be decided upon the terms of the will, would be one of great difficulty, and upon which the authorities and opinions of judges have widely differed. I have, however, the satisfaction of finding that I am not in this case called upon to decide this question. The mother, according to my construction of the will and the authorities above referred to, had a personal interest in the fund; and as between herself and her children she was

either a trustee, with a large discretion as to the application of the fund, or she had a power in favour of the children subject to a life estate in herself." His Lordship could not help observing that if the thing were so difficult to decide by reason of the vagueness of the words which the testator had used, and which he probably used for the purpose of preventing the difficulty from being decided, it could not be right to decide it at all. In the present case the words used were much stronger in favour of the power of the widow to deal with the property. Then, in *Godfrey v. Godfrey*, the words were—"I do hereby bequeath to my wife the whole of my property, and it is my dying wish that the property which I now bequeath to my wife shall be used as to her seemeth best for her own and her children's welfare." But there the Vice-Chancellor Wood, after saying that the words clearly implied a trust, went on to say that the only difficulty arose from the words "as to her seemeth best," and that it might be that those words were merely a direction as to the control and management of the property. That showed strongly that if the words giving a power of disposal were such that you could not refer them merely to the control and management of the property, it would be most difficult to say that the wife took only a limited interest in the property. In the present case his Lordship thought that the words could not be referred merely to the control and management of the property, for the wife had power not merely to manage, but to expend the *corpus* of the property. It was sufficient to say that there was not here enough to satisfy his Lordship that this lady had exceeded the authority given to her by the testator's will. The appeal must be dismissed, and with costs, as the appellants were seeking to get the property free from the annuity with which it was charged.

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Mortgage—Notice—Priority—Vendor's lien for unpaid purchase money—No receipt on the purchase deed.

Where a purchase deed contained a recital that the purchase money had been paid or accounted for, but there was no receipt for the purchase money on the back of the deed.

Held (affirming a decision of Vice-Chancellor Malins), that the vendor, in respect of his lien for unpaid purchase money, was entitled to priority over a mortgagee of the purchaser.

[19 W. R. 614.]

This was an appeal from a decision of Vice-Chancellor Malins, which is reported 18 W. R. 911, where the facts are stated. The defendants appealed.

Collins, Q.C., and Spred, for the appellants, contended that, whatever might be the case where a deed was in the common form, expressing the property to be conveyed to the purchaser in consideration of a sum of money paid, yet where, as in the present case, the deed contained an express recital that the purchase money had been paid or accounted for by Hopkins, the purchaser, the absence of a receipt on the back of the deed for the purchase money was not enough to put a subsequent mortgagee upon inquiry whether the purchase-money had

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been actually paid or not. They referred to *Rice v. Rice*, 2 W. R. 139, 2 Drew. 73.

Glass, Q. C., and *Berkeley*, for the plaintiff, were not called upon.

JAMES, L. J., said that the Vice-Chancellor, in his judgment, had gone so fully and elaborately into the matter that it was not necessary to say much. It was quite clear that when the legal estate in the property was conveyed to Hopkins it was within the knowledge of Mr. J. R. Cobb, who was acting as solicitor to his father, that the purchase-money had not been paid or secured to the vendor, and it was not sufficient to say afterwards that as the deed had been handed to Hopkins he was entitled to assume that the purchase-money had been paid. His Lordship agreed with the Vice-Chancellor that it was an act of the grossest negligence on the part of Cobb not to have gone to Hopkins to inquire whether any receipt had been given for the purchase-money.

MELLISH, L.J., also agreed with the judgment of the Vice-Chancellor, and in the reasons which he gave for it.

CORRESPONDENCE.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—I desire to report, through the *LAW JOURNAL*, the particulars of a suit lately decided in the Division Court of Peterborough, before Judge Dennistoun, and to ask your opinion upon it.

During the year 1861 the defendant went into occupation of the plaintiff's shop as a sub-tenant of another tenant of the plaintiff, whose term expired in May, 1862, and who was bound to pay all taxes assessed during his term. The assessment is always made before the month of May. In October, 1861, defendant took a lease of plaintiff of the same premises for three years from May, 1862, covenanting to pay, as in the previous lease, all taxes assessed during his term, as well as all taxes then assessed. At the termination of defendant's lease in May, 1865, after the assessment for that year, he left, giving plaintiff his note for a portion of the rent then due, which note was placed in suit for a balance due thereon. To this the defendant claimed to set-off the taxes on the premises, paid by him between May, 1865, and the end of that year, \$29 32. On the trial the Judge allowed this set-off. Plaintiff thereupon applied for a new trial, which application the Judge refused.

In his judgment upon the trial of the cause the Judge says—"I cannot believe that defendant ever had intention of paying four years'

taxes of premises held by him under a demise for three years." The covenant in defendant's lease was, as already stated, to pay all taxes, &c., assessed *during his term*, as well as all taxes *then* assessed upon the premises. The taxes for 1862 were assessed during the continuance of the former lease, and under which the then tenant was bound to pay them for that year. If defendant paid any portion of these taxes, that was a matter between him and his immediate landlord, and with which the plaintiff had nothing to do. The defendant's taxes did not begin under plaintiff's lease until the year 1863, and, of course, he was bound to pay them for that and the two following years. Yet, notwithstanding these express covenants on the part of defendant and of the former tenant, the Judge says that defendant did not intend to pay these taxes. It will be observed that defendant had no taxes to pay under plaintiff's lease until the year 1863, the previous tenant being bound to pay them up to that year. In the same manner the taxes of the tenant who went in after defendant did not commence until the year 1866, the rule as to taxes being the same with all the tenants, each getting the benefit of the first year's taxes.

I make no comments upon this case, leaving them to the judgment of an impartial public.

A SUITOR.

Peterborough, June 16, 1871.

[We publish this letter as requested, but are not prepared to say that the learned Judge may not have decided the case according to an interpretation of the contract agreeable to equity and good conscience, though possibly not construing it with legal strictness. The notes in Smith's *Leading Cases to Lampligh v. Brathwait*, *Spragne v. Hammond*, 1 Bro. & Bin. 59, *Stubbs v. Parsons*, 3 B. & Ald. 516, and *Wade v. Thompson*, 8 U. C. L. J. 22, are all authorities upon the question. The giving and taking a promissory note would *prima facie* seem to indicate a waiver of a previously existing right of set off, if any such existed. More than this we cannot say from the above material, even were we inclined (which we are not) to sit in judgment on decisions given after proper consideration and with a desire to act impartially and fairly, and this we must take for granted unless the contrary appears most clearly beyond the possibility of explanation. —Eds. L. J.]

CORRESPONDENCE.—REVIEWS.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Under the Assessment Act of 1869, and cap. 27, 33rd Vic., "The stipend or salary of any clergyman or minister of religion, while in actual connection with any church, and doing duty as such clergyman or minister, to the extent of one thousand dollars, and the parsonage or dwelling-house occupied by him, with the land thereto attached, to the extent of two acres, and not exceeding two thousand dollars in value, are exempt from taxation."

A minister of religion, within the meaning of the 4th sec. of cap. 27, 33rd Vic., above quoted, desiring to exercise the right of franchise, waives the right to have his dwelling-house or parsonage exempt from taxation, and requests the assessor to assess the same at its value, \$800. The assessor accordingly assesses the property at that sum, and puts the minister upon the assessment roll.

Query.—Can he legally do so?

If with the consent of the minister he can, what would be the effect if a municipal elector, under sub-sec. 2 of sec. 60 of the Assessment Act, object that the minister has been "wrongfully inserted on the roll," and appeal to the Court of Revision?

An answer in the next number of the LAW JOURNAL will oblige

A SUBSCRIBER.

Simcoe, 21st June, 1871.

[There can be no doubt if the person assessed declines the exemptions which the law makes in his favour, and the assessor returns the property or income assessed for a sufficient sum, the person is entitled to his franchises founded upon the assessment. He cannot be held to be "wrongfully inserted," if it was done at his own request, and upon waiver of his rights of exemption.—Ed. L. J.]

Recent Legislation—Tinkering with Acts of Parliament.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN:—By the Superior Courts Acts, Con. Stat. U. C., caps 10 and 12, the Courts of Queen's Bench, Common Pleas and Chancery had names assigned to them respectively, designating them to be Courts of "Upper Canada." The Court of Queen's Bench was to be presided over by "the Chief Justice of Upper Canada." The Court of Chancery was to be presided over by a chief judge to be

called "the Chancellor of Upper Canada;" but by the recent Act of Ontario, 34 Vic. cap. 8, the Court of Queen's Bench for Upper Canada is to be called during the reign of a king, "His Majesty's Court of King's Bench for Ontario," and, during the reign of a queen, "Her Majesty's Court of Queen's Bench for Ontario," and the Court of Chancery for Upper Canada is to be called "The Court of Chancery for Ontario;" so that the 5th sec. of the Act first hereinbefore named, and the 3rd section of the Act secondly hereinbefore named being unrepealed, the Queen's Bench for Ontario will be presided over by the Chief Justice of Upper Canada, and the Court of Chancery for Ontario will be presided over by the Chancellor of Upper Canada.

Would it not be a good thing when Acts of Parliament are to be amended that the person who prepares Bills to be submitted to the consideration of the Legislature should have some reasonable knowledge of the provisions of Acts he is dealing with, and shew some precision in their preparation? Yours, &c.,

UNION.

REVIEWS.

A TREATISE ON THE STATUTES OF ELIZABETH AGAINST FRAUDULENT CONVEYANCES, THE BILLS OF SALE REGISTRATION ACT, AND THE LAW OF VOLUNTARY DISPOSITIONS OF PROPERTY INDEPENDENTLY OF THOSE STATUTES: with an Appendix, containing the above Acts and the Married Womens Property Act, 1870; also some unpublished Cases (1700-1783), from the Coxe and Melmoth MS. Reports. By Henry W. May, B.A., Ch. Ch., Oxford, and of Lincoln's Inn, Barrister. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar.

This treatise has not been published before it was wanted. The statutes of Elizabeth against fraudulent conveyances have now been in force for more than 800 years. The decisions under them are legion in number and not at all times consistent with each other. The incongruity of the decisions arises in great part from the cause that many of them depend rather upon the finding as to the facts than as to the law, and very many of them are decisions of Courts of Equity, which, unaided by juries, find facts and decide the law applicable to the facts. An attempt to

REVIEWS.

reduce the mass of decisions into something like shape, and the exposition of legal principles involved in the decisions, under any circumstances, must have been a work of great labor, and we are pleased to observe that in the book before us there has been a combination of unusual labor with considerable professional skill.

This is the first exhaustive work on the subject of which it treats that has been published within the past seventy years. We have often wondered that no one was found able and willing to bring out a new edition of Roberts' Treatise on the Statutes of Elizabeth, which, when published in 1800, was looked upon as a very able work. Mr. May, rather than edit a new edition of that work, has, we think, considering the multitude of cases on the statutes, very wisely decided, to give us a new treatise, which we have in the book before us. There are some imperfections in the book, but this could not be otherwise than expected when we consider the difficulty of the subject. But the imperfections (attributable to humanity) are few.

The work is divided into six parts. The first treats of the general operation of the statutes of Elizabeth against fraudulent conveyances and the general distinctions between them. It is shown that while the Statute of 13 Elizabeth protects creditors, the Statute 27 Elizabeth protects purchasers; that both statutes were re-enacted in Ireland, and have been substantially re-enacted in New York; that the Statute 13 Elizabeth is declaratory of the Common Law, which in this respect is declaratory of the Civil Law; that its principles have been adapted from the Civil Law by Holland, Spain and France, but that both in principle and in practical operation the statute is distinct from the bankrupt laws; that deeds void in bankruptcy are not always void under the Statute of Elizabeth, while every conveyance void against creditors under the Statute of Elizabeth is an act of bankruptcy. The second part treats of the rights of creditors under 13 Elizabeth. It is sub-divided into eight chapters, treating, respectively, of property within the statute, voluntary conveyances as against creditors at the time, voluntary alienations as against subsequent creditors, conveyances for value as against creditors, badges of fraud in conveyances for value, continuance in possession a badge of fraud,

the Bills of Sale Registration Act, 1854, and who are entitled to rank as creditors under 13 Elizabeth. Each of these topics is dealt with exhaustively; references are made to the very latest cases, and the law enunciated, when possible, in the very words of the Judges. This part embraces no less than 150 pages of the work, and is the most important part of it. The arrangement is so good that each chapter appears to flow from its precursor, and when the last chapter is read the reader feels that all has been said that can be said on the subject. The third part treats of the rights of creditors under the twenty-seventh Elizabeth. Being a much less expansive branch of the law than the preceding, there are only two chapters in this part of the work. These discuss, respectively, the conveyances which are void against purchasers and show who are entitled to be treated as purchasers. It is explained that voluntary gifts are not void simply because voluntary, but because opposed to the interest of fair purchasers; that knowledge of the voluntary conveyance in no manner affects the purchaser so that an artificial fraud has grown out of the interpretation of the statute in this—that where there is no fraud or fraudulent intention whatever, the deed is declared fraudulent for the purposes of the Statute. But the purchaser must be shown to be a purchaser for money or other valuable consideration. The many cases as to when a man can or cannot be said to be such a purchaser, are given, and so given as to make them to some extent intelligible parts of a whole, but which standing alone are not easily understood. The fourth part of the work treats of the important question, what is a valuable consideration under the Statutes of Elizabeth? This is done in five chapters. The first deals with consideration generally, the second consideration between husband and wife, the third voluntary conveyances made good by considerations arising subsequently, the fourth the nature and extent of the consideration of marriage, which even in our metallic age is said to be "the best consideration that can be," the fifth, post-nuptial settlements, where the consideration of marriage does not extend, and other considerations are found necessary to support them. The fifth part treats of voluntary dispositions of property independently of the Statutes of Elizabeth, and as the subject,

REVIEWS—ITEMS.

though not heavy, is necessarily diffuse, no less than four chapters are devoted to it. The first deals with voluntary agreements enforceable in equity, voluntary limitations in assignments for value, and shews how far formal defects are aided. The second deals with the abstruse branch of the law—gifts *inter vivos*—and is subdivided as follows: I. Attempts by legal owner to transfer the legal interest in property transferable at law. II. Gifts, without attempting to disturb the legal title. III. Attempts by legal owner to transfer legal interest not legally assignable; and IV. Legal obligation incurred without legal transfer. It is to be hoped that the reader of this chapter will, when through it, have some correct idea as to what is "a complete gift," a thing supposed to be easily understood, but most difficult of definition. The third chapter deals generally with the questions when and to what extent the absence of a valuable consideration will invalidate dispositions of property. The fourth chapter shews when gifts may be treated as void between the parties for fraud practised by the donor. The sixth part of the work treats of points of practice and costs under the Statutes of Elizabeth the first chapter dealing with practice and the second with costs. The book would not have been complete without this. In it we find points of much interest to the practical man, which are not so succinctly found in any other treatise. The appendix, as mentioned in the title page, contains the acts and some unpublished cases from the Coxe and Melmoth MS. Reports—thirteen in number—of more or less interest, as bearing on the topics in hand.

We cannot conclude our notice of this work without saying that it reflects great credit on the publishers as well as the author. The facilities afforded by Messrs. Stevens & Haynes for the publication of treatises by rising men in our profession are deserving of all praise. We feel assured that they do not lightly lend their aid to works presented for publication, and that in consequence publication by such a firm is to some extent a guarantee of the value of the work published. Few young men have the means to publish works at their own risk. Men of means do not, as a rule, take the trouble to write books for publication. We do not know to which class Mr. May belongs, but this we can say, that he has produced a book the perusal of

which has given us sincere pleasure, and the use of which will lighten the labours of men who, like ourselves, are engaged in the active practice of an arduous and responsible profession.

LEGAL NOTES—ENGLAND.—We take the following from the "Summary of Events," in the *American Law Review*:—

"Three acts passed in the course of last session have been the means of calling public attention to the importance of providing a better machinery for the drawing and revising of our statutes, a subject which has been ably dealt with in a book recently reviewed by you—Mr. Holland's 'Essays on the Form of a Law.' One of these—the Married Woman's Property Act—originated in the House of Commons, was then greatly cut about and modified by the House of Lords, and eventually passed, rather in a hurry, in the shape which the timid conservatism of the Lords had given it. Although it was the product of the wisdom of several eminent lawyers in the upper house, it now turns out to have brought the law into an infinitely more perplexed and doubtful condition than it was before, and produced various anomalies which can hardly have been intended. For instance, it gives a married woman the right of suing in her own name on certain contracts made by her after marriage without exposing her to the corresponding liability of being sued; and while making her separate property liable for debts contracted by her before marriage, it relieves a husband from all liability for a wife's antenuptial debts, even in cases where the wife may have no separate estate to answer them. A second statute, the Juries Act of 1870, has proved so unworkable that a bill has already been carried through Parliament, and received the royal assent, by which some of its enactments are repealed. When such things can happen, it is clearly time that steps were taken to provide for the examination of every bill by a body of competent lawyers, who should be held responsible for its technical correctness, and the consistency and definitely of its provisions. It is some comfort to know that neither of these unlucky acts proceeded from the office of the Government draughtsman, Mr. Thring, who has rendered so much service by introducing a more uniform method of statute-drawing. The fate of the third act illustrates the perils of consolidation."

"The Lord Chancellor's bill for the fusion of legal and equitable procedure, is, it seems, to be introduced first into the Commons, and not, as last year, into the Lords."

Erskine rarely received a rebuff, in which particular he was more lucky than Dunning (Lord Ashburton), who, in his cross-examinations, though he sometimes gave good shots, as often got as good as he sent. Asking a witness why he lived at the very verge of the court, the ready reply was, "In the vain hope of escaping the rascally impertinence of Dunning."

HOW TO BECOME A LAWYER IN ONTARIO.

DIARY FOR SEPTEMBER.

1. Fri. St. John's
2. Sat. County Court Term (York) ends.
6. SUN. 15th Sunday after Trinity.
8. Fri. Nativity of the Blessed Virgin.
10. SUN. 16th Sunday after Trinity.
21. Tues. St. Matthew.
17. SUN. 15th Sunday after Trinity.
27. SUN. 16th Sunday after Trinity.
29. Fri. St. Michael.

THE

Canada Law Journal.

SEPTEMBER, 1871.

HOW TO BECOME A LAWYER
IN ONTARIO.

FIRST PAPER.

Scarcely any other portion of the statute law appears to be so rarely read and so little understood as the Acts which directly affect the profession itself. We very much doubt whether one in every five among the readers of this article can tell when and by what statute the necessity for "keeping term" was obviated, and probably a still fewer number can refer to the enactment which provides that volunteer service may be reckoned as part of the time of an articulated clerk.

And this neglect of the golden maxim, "Read and you will know," seems especially to characterize those members of the profession who sign themselves *students* at law, but who appear to forget that he who aims at becoming a successful lawyer must take nothing for granted, must depend for his information not upon the officials of the Law Society or the conductors of legal and other journals, but must *for himself* "read, mark, learn and inwardly digest" the statutes which are open to him as well as to the most learned counsel in the land.

We are constantly in receipt of letters from young men of inquiring minds, but not so certainly of studious habits, each of whom seems to regard his case as peculiar and exceptional, and to be blissfully ignorant of the fact that every step in his legal career from its inception to its consummation, has long since received the attentive consideration of the Legislature and the Benchers; and we understand that some "that are in authority over us" in the Law Society, have even more reason than ourselves to complain of this

want of independent research among those who are just entering the profession.

We make these remarks in no censorious spirit. Nothing can possibly give us greater pleasure than to afford every assistance in our power to those, who after making use of all the means at their command, are still unable to decide the questions which will arise upon the construction of these statutes and regulations. What we protest against is not the *use* but the *abuse* of "the right to inquire," and the practice of rushing at once into print for a solution of difficulties which the most cursory reading of the statutes would often set at rest.

The law relative to the admission and conduct of barristers and attorneys is contained in chaps. 34 and 35 of the C. S. U. C., and in the following amending statutes:—23 Vic. chaps. 47 & 48; 28 Vic. c. 21; 29 Vic. c. 29; 29-30 Vic. c. 49; 31 Vic. c. 23 (Ont.), and 32 Vic. c. 19 (Ont.). Only three of these are of any length, each of the remaining ones consisting of a single sentence only.

The 23rd Vic. chaps. 47 and 48, amends the Consolidated Act by providing that a University degree, in order to entitle its possessor to admission or call in three (instead of five) years, must have been taken before the commencement of, and not during, his legal career. This statute (chap. 47) with the Act which it amends, are the only enactments of the Legislature affecting barristers *as such*, that branch of the profession having been considered competent to govern itself.

The statutes remaining to be considered apply only to attorneys, who are, to a much greater extent than members of the bar, under the control of the Legislature.

Of these, the 28 Vic. c. 21, extended the time of service necessary to entitle a Canadian or English barrister to be admitted as an attorney, from one year to three years; made certain verbal amendments in the two first sub-sections of the C. S. U. C. c. 48 s. 8; and required that an articulated clerk on applying for admission, should, together with his own affidavit, file a certificate from his principal of due service under his articles.

29 Vic. c. 29 simply repealed the fifth sub-section of sec. 8 of the Consolidated Act.

29-30 Vic. c. 49 (Hon. J. H. Cameron's Act), made new provisions respecting attorneys' annual certificates, and in the concluding sec-

HOW TO BECOME A LAWYER IN ONTARIO.

tion (sec. 7) provided that the Benchers might allow to an articled clerk any time spent on active service with the volunteers or militia, as time served under his articles; a power which is, we believe, almost invariably exercised.

Then follows Mr. Blake's Act (81 Vic. c. 23, Ont.), to which we shall refer more fully hereafter; and, finally, the Act of 32 Vic. c. 19 (Ont.), which briefly dispensed with the attendance of law students upon the sittings of the courts during term. If, in addition to these statutes, the student will refer to the regulations of the Law Society which are collected in the last edition of the Law List, pp. 74-101, he will have completed his examination of the authorities which affect the question of admission to the profession, and his lucid explanation of points which are generally thought to be

"Wrapped about with awful mystery,"

will entitle him to be regarded as a legal oracle among those of his compeers who are not readers of the *Law Journal*.

In comparing and examining these not very numerous authorities, he must, however, keep clearly in mind the distinction between the course marked out for a "student at law," which ends in call to the bar, and that which is prescribed for an "articled clerk," terminating in his admission as an attorney. In order to the first, no service under articles is necessary, and no intermediate examinations are required *by enactment of the Legislature*, which has delegated its power over barristers at law (in both their embryonic and fully developed condition), almost wholly to the Law Society.

By resolutions of the Benchers, however, (Law List p. 99) the same examinations are required of students at law as are necessary in the case of articled clerks; and if the candidate adopts the usual, indeed the almost invariable plan of taking both these courses at the same time, he will (so far, at least, as his intermediate examinations are concerned) require to pay attention only to the regulations respecting the admission of attorneys; for by No. 6 of the resolutions aforesaid, the examinations required by statute (81 Vic. c. 23, s. 1) to be passed by him as an articled clerk, shall be allowed him as a student at law "without further examination or certificate to that effect by the Secretary of the Law Society."

Supposing then that "our hero," having

attained the mature age of sixteen years, (Law List p. 76), has chosen for himself the profession of the Law, his first care will be to give notice that he intends to present himself before the examiners for admission. This he can do by asking any legal friend whose business requires his presence in Toronto during the coming term, i. e., between the 20th of November and the 9th of December next, or any City barrister or student, to give such notice for him; taking care to accompany the request with a fee of five shillings, which must be paid to the Secretary on filing the notice.

He will then, in all probability, select an office (or have it selected for him) and article himself to a practising attorney or solicitor to serve him for the term of five (or three) years "fully to be complete and ended." The only point worthy of remark with regard to the articles is that they should be filed (with proper affidavits of execution), within three months from their date, in the office of the Queen's Bench or Common Pleas at Osgoode Hall; for, if not filed within such time, "the service of the clerk *shall* be reckoned *only from the date of filing*;" (28 Vic. c. 21 s. 9), and the previous service will not be counted as part of the five (or three) years required.

To return to the subject of admission to the Law Society. If the notice above mentioned be given during the coming Michaelmas term, (i. e., between the 20th November and the 9th December), the candidate will present himself for examination at Osgoode Hall on Tuesday, the 23rd January, 1872. He will probably have received from the Secretary of the Law Society, a notice informing him of the day when the examination is to take place, but should no such notice be sent he will be justified in appearing at the time we have named (Law List, p. 76), prepared to pay his admission fee of \$46, and with the first and third books of the Odes of Horace and the three first books of Euclid at his finger-ends,—figuratively, of course, for no literal contact, with the latter at least, will be permitted. If he intends to "go up" in the Senior or University Class, he must also read the first book of the Iliad; and if this and the Horace are prepared as they should be, he need not (with deference to the dread tribunal be it spoken) feel any intense anxiety as to his mathematical attainments. Of course, in

HOW TO BECOME A LAWYER IN ONTARIO.

thus expressing ourselves, we are not speaking in any sense "with authority;" but we are aware of no instance for some time past in which a graduate or senior student to whom Homer and Horace seemed as familiar as they ought to be, was required to demonstrate a proposition in Euclid, or terrified by a question on Locke, Logic, or Astronomy.

So soon as the candidate has passed (we trust with credit) through this preliminary ordeal, and has had the usual item, mentioning his "creditable examination," "compliments of the Benchers," etc., duly inserted in the local paper,—we should recommend him, if he be what is called "a three years' man," to fall at once to the work of preparing for his "first intermediate."

A careful perusal of Mr. Blake's Act (31 Vic. c. 23, Ont.), will shew that this examination may be passed *at any time* during the third year of a five years course, or during the first year of service in case the clerk has previously taken a degree. There seems to be an impression, especially among the latter class, that a year must elapse after admission and before this first examination. Such, however, is not the case, and, as will be seen hereafter, a mistake on this point may occasion a delay of three or even six months before admission to practise. It is true the third resolution respecting *students at law* provides that the first intermediate examination of a three years' man "shall be in his *second** year, and the second within the first six months of his third year;" but the effect of this regulation must not be misunderstood.

In the first place, it is *not intended* to apply to articled clerks, who are exempted from its scope by resolution No. 6 (already referred to) and are fully provided for in sec. 1 of the statute. The third resolution affects those only for whom no statutory provision has been (or indeed could be) made, and fixes the times of examination in the case of students at law *who are not*, at the same time, *articled clerks*.

Secondly, if an articled clerk should thus attempt to "serve two masters," and conform to a resolution on the face of it intended only for students at law, he would inevitably incur

the delay above spoken of. For since by the statute, one year at least must elapse between each examination and the succeeding one, the effect of postponing the first intermediate to any time *within* the second year of service, would be to defer the final (attorneys') examination for at least three months beyond the three years. We are aware of several instances in which this has actually been done, and where articled clerks, in attempting to comply with the regulation referred to, have been compelled to wait for three months after the expiration of their term of service before presenting themselves to be examined for admission.

The first intermediate, then, should be passed early in the antepenultimate year of service. Between the first and second of such intermediate examinations, the interval of a year is required by the Act (sec. 1), and in these cases it is somewhat strictly enforced. So far as we are aware but one instance has yet occurred in which the Benchers have exercised the power conferred upon them by section 6 to shorten the interval between these examinations in certain cases.

Between the second intermediate and the final examination for admission, *one year at least* must elapse. According to the words of the statute, this second examination must be passed "at some time not less than one year" after the first intermediate, "and *during the year next but one* before the time of the final examination."

We may notice here the peculiarity of the wording adopted in this section of the Act. "Thereafter" in the seventh line grammatically refers to the final examination, which would of course be absurd, the intention being that it should refer to the examination to be had in "the year next but two, &c.," i.e., the first intermediate examination.

It is clear then that a student admitted in the junior class of November, 1867, or in the University class of November, 1869, who has not passed his first intermediate until November, 1870, *must* take the second intermediate in Michaelmas term, 1871, or else be delayed three months beyond the statutory period before he can go up for admission. He cannot pass this second examination *before* November, 1871, since it must be "not less than one year" after the first, nor can he pass it *after* November, 1871, if it is to be

* The substitution of "third" for "second" in the Law List, p. 99, and elsewhere, is evidently a clerical error or printer's mistake.

HOW TO BECOME A LAWYER IN ONTARIO.—LAW REFORM COMMISSION.

"during the year last but one before the time of his final examination" (November 1872), for that year will expire in November, 1871. Therefore, since this last condition is statutory and imperative, if the first of the examinations under Mr. Blake's Act be delayed until February, 1870, or the second be not passed in November, 1871, the final examination and admission of the student will be delayed until February, 1873,—three months beyond the term of service required by the statute.

There is no doubt, however, that as a student at law, a candidate may pass the intermediate examinations at intervals not necessarily the same as those mentioned in the Act, (See Rules E. T. 1868, Law List p. 99), but this will be of no avail *quoad* his admission as an attorney, for although the Benchers may allow the examinations of an articled clerk, passed under the statute, to enure to his benefit as a student at law, there is no provision, nor, from the nature of the case, have they any authority to provide that the converse of this shall also be true. The attorney is almost wholly a creature of the Legislature, which has prescribed the time of his examinations, and fixed the intervals between them; and no resolution of the Law Society can possibly overrule the express enactment of the statute.

It is probable, also, that no question would arise as to whether a student had complied with the law in this respect, until his final examination, when any failure to satisfy the provisions of the statute would of course become apparent on the certificate of the Secretary under the 7th resolution respecting articled clerks.

It is only necessary to remark, in addition to what has already been said, that these examinations take place at 10 a. m. on the first Wednesday of every term, and that under Rule 1, every articled clerk, before presenting himself for examination, must file with the Secretary of the Law Society a certificate signed by himself, shewing the date of the execution and filing of his articles, the name of his principal, the number of assignments, the year of his service, and whether he is a graduate of any University. This certificate should, strictly speaking, be filed on or before the first day of the term; but, in practice, is usually received by the Secretary on the morning of the examination. A fee of one dollar is required on filing it.

The subject of examination for call to the bar and admission to practise will be discussed in a future article, but here, for the present at least, we may resign the post of Mentor to our imaginary Telemachus, feeling sure that by the time he is prepared to "go up for his final" he will have learned the lesson of self-help well enough to depend no longer upon editorial opinions, and will, we trust, have ceased to take up the time and trespass upon the patience of certain Benchers whose kindness to students has become proverbial, by rushing into a correspondence which can only end in referring him to the Acts respecting Attorneys.

LAW REFORM COMMISSION.

The following gentlemen have been appointed Commissioners to inquire into and report upon the present jurisdiction of the several Law and Equity Courts of Ontario, and upon the modes of procedure now adopted in each, and upon such other matters and things therewith connected as are set out in the commission:—Hon. Mr. Justice Wilson, Hon. Mr. Justice Gwynne, Hon. Vice-Chancellor Strong, His Honor Judge Gowan, and Mr. Christopher Patterson, Barrister. Amongst other matters, they are to consider the advisability of a fusion of Law and Equity, and to suggest a scheme for carrying it into effect.

We have heard it remarked that there is an undue preponderance of Common Law men on the Board; but this objection can scarcely be said to be well-founded, when we remember that Mr. Gwynne, though now on the Common Law Bench, for many years devoted himself principally to Chancery business, and was for some time a student in the office of Mr. Rolt in England; and again Mr. Gowan, so far as he represents a class, must be looked upon as a representative of the Division Court system, in which courts, justice is to be administered according to "equity and good conscience." Even if there is anything in the objection it must be remembered that the Commission will embrace other subjects than the fusion of Law and Equity, some of which would seem to require greater knowledge of procedure at law than in Chancery.

As to the qualifications of the several members of the Commission, especially for that branch of it to which we have particu-

THE FREE NAVIGATION OF THE RIVER ST. LAWRENCE.

largely referred, the selection has been most happy. Judge Wilson, who is to be Chairman, is a man of most patient industry, great research and comprehensive mind, and will give the matter no light attention, and with his coadjutors may be relied on to investigate the subject thoroughly. Judge Gwynne, from his intimate knowledge of both systems, practically as well as theoretically, will be especially competent to form a correct opinion as to their relative merits, whenever it may be necessary to contrast the two, and what can best be taken from each to form a complete whole; and he will enter upon the discussion free from any supposed bias of either system, natural enough to those who have devoted themselves almost entirely to one of them. Than Vice-Chancellor Strong, no man is more competent to explain the theory and practice of that Court, which has been a witness of his intellectual power and learning. Mr. Gowan has long enjoyed the confidence of and given great assistance to successive administrations in various ways, and has an increasing reputation. No person in Canada has such intimate knowledge as he of the theory and practical working of the Division Court system, which is really the nearest approach at present to a fusion of law and equity, albeit the notions of some of its judges as to equity are of the crudest. And to conclude, the reputation of Mr. Patterson at the Bar, is very high; without the showy qualities of some others, he is known to be a man with broad views of things, and of much learning and industry, and will be a most useful element in this Commission.

It may be a question, however, how far it is advisable for the Commission to mature any scheme for the consolidation or alteration of any of the Courts as at present existing, until some decided step has been taken in England, where a similar subject has received the careful attention of a most intelligent and learned Commission for some time past. There is no such necessity for an immediate revolution in our Courts, even admitting, for the sake of argument, that a change is advisable, as to warrant any hasty action, whereby we should lose the benefit to be derived from the light to be thrown on this most difficult subject in England.

SELECTIONS.

THE FREE NAVIGATION OF THE RIVER ST. LAWRENCE BY THE CITIZENS OF THE UNITED STATES.

The consolidation of the Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, into the Dominion of Canada, has opened a wide field for the exercise of statesmanship to the leaders of the Canadian people. Dependent but in name, Canadians are now free to shape the destinies of their country.

With increased powers have arisen new responsibilities. The Dominion must now bear a full share of the burthens of the realm in lieu of the trifling weights laid on the infant Provinces by the Mother Country. Conflicting rights require adjustment, national and religious prejudices claim treatment, and international difficulties demand settlement. To restore friendly commercial relations with our neighbours, but lately sources of prosperity; to subdue the jealousy of race—the bane of the Province of Canada; to extinguish the embers of religious feud, now threatening to burst into flame; to arrange the Fishery, the St. Lawrence, and the Fenian difficulties, all pregnant with war, if not settled at once and for ever,—are some of the tasks of the Ministry of the day. Verily, the bark of State requires skilful handling by its pilots to avoid the reefs and shoals lying in its course.

With a population of but four millions, Canada is bounded to the south by the United States, inhabited by nearly forty millions of people. The absorption of Mexico and the Dominion into the Union is favoured by many American statesmen; the Continent of North America, with the adjacent islands, forming one vast Republic, is the dream of United States politicians. The instability of parties, the corruption pervading the body politic, and the power of the mob, all combine to make the policy of the United States uncertain and dangerous to their neighbours. No expedient to divert the minds of their people from the strife of party, would be so popular as a foreign war, undertaken for the acquisition of territory on this continent; each individual would think that in the national losses he would secure a fortune, and would smother his patriotism in his selfishness.

For many years past the United States Government have nursed grievances against their neighbours—it is of more importance that the Alabama claims should never be settled than that by a money payment far exceeding the actual losses, the grievance should be abated. The Fishery, the St. Lawrence, and the Fenian questions, are all open sores, irritating to Canada and Great Britain, which, when the opportunity is favourable, may furnish pretexts for a declaration of war.

THE FREE NAVIGATION OF THE RIVER ST. LAWRENCE.

It is the object of this paper to investigate the claim so persistently brought forward by the United States to the right of free navigation of the River St. Lawrence, to determine its validity, and to suggest, if possible, a mode in which it can be quieted for ever.

President Grant, in his Message to Congress, delivered on the 5th Nov. 1870, thus drew the attention of his countrymen to the subject :

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A like unfriendly disposition has been manifested on the part of Canada in the maintenance of a claim of right to exclude the citizens of the United States from the navigation of the St. Lawrence. This river constitutes a natural outlet to the ocean for eight States with an aggregate population of about 17,600,000 inhabitants, and with an aggregate tonnage of 661,367 tons upon the waters which discharge into it. The foreign commerce of our ports on these waters is open to British competition, and the major part of it is done in British bottoms. If the American steamer be excluded from this natural avenue to the ocean, the monopoly of the direct commerce of the Lake ports with the Atlantic would be in foreign hands, their vessels on transatlantic voyages having an access to our lake ports which would be denied to American vessels on similar voyages. To state such a proposition is to refute its justice. During the administration of Mr. John Quincy Adams, Mr. Clay unquestionably demonstrated the natural right of the citizens of the United States to the navigation of this river, claiming that the act of the Congress of Vienna in opening the Rhine and other rivers to all nations showed the judgment of European jurists and statesmen that the inhabitants of a country through which a navigable river passed have a natural right to enjoy the navigation thereof as far as the sea, even though passing through the territory of another power. This right does not exclude the co-equal right of the sovereign possessing the territory through which the river debouches into the sea to make such regulations relative to the policy of the navigation as may be reasonably necessary, but these regulations should be framed in a liberal spirit of comity, and should not impose needless burdens upon the commerce which has the right of transit. It has been found in practice more advantageous to arrange these regulations by mutual agreement. The United States are ready to make any reasonable arrangement as to the police of the St. Lawrence which may be suggested by Great Britain. If the claim made by Mr. Clay was just when the population of the States bordering on the shores of the lake was only 3,400,000, it now derives greater force and equity from the increased population, wealth, production, and tonnage of the States on the Canadian frontier. Since Mr. Clay advanced his argument on behalf of our right, the principles for which he contended have been frequently and by various nations recognized by law, and by treaty extended to several other great rivers. By the treaty concluded at Mayence in 1831, the Rhine was declared free from the point where it is first navigable into the sea. By the convention between Spain and Portugal, concluded in 1835, the navigation of the Douro, throughout

its whole extent, was made free for the subjects of both countries. In 1853, the Argentine Confederation, by treaty threw open the free navigation of the Paran and Uruguay rivers to the merchant vessels of all nations. In 1856, the Crimean war was closed by a treaty which provided for the free navigation of the Danube. In 1858, Bolivia, by treaty, declared that it regarded the Rivers Amazon and La Plata, in accordance with the fixed principles of national law, as highways or channels opened by nature for the commerce of all nations. In 1859, the Paraguay was made free by treaty, and in December, 1866, the Emperor of Brazil, by Imperial decree, declared the Amazon to be open to the frontier of Brazil to the merchant ships of all nations. The greatest living British authority on this subject, while asserting the abstract right of the British claim, says it seems difficult to deny that Great Britain may ground her refusal upon strict law; but it is equally difficult to deny, first, that in so doing she exercises a law harsh in the extreme, and secondly, that her conduct with respect to the navigation of the St. Lawrence is in glaring and discreditable inconsistency with her conduct with respect to the navigation of the Mississippi. On the ground that she possessed a small domain in which the Mississippi took its rise, she insisted on the right to navigate the entire volume of its waters. On the ground that she possessed both banks of the St. Lawrence, where it disembogues itself into the sea, she denies to the United States the right of navigation, though about one-half of the waters of Lakes Ontario, Erie, Huron, and Superior, and the whole of Lake Michigan, through which the river flows, are the property of the United States. The whole nation is interested in securing cheap transportation from the agricultural States of the west to the Atlantic seaboard, to the citizens of those States. It secures a greater return for their labour to the inhabitants of the seaboard. It offers cheaper food to the nation, an increase in the annual surplus of wealth. It is hoped that the Government of Great Britain will see the justice of abandoning the narrow and inconsistent claim to which the Canadian Provinces have urged their adherence."

Wheaton, in his "Elements of International Law," gives a statement of the controversy on the subject in the following words :

"The claim of the people of the United States of a right to navigate the St. Lawrence to and from the sea, was, in 1826, the subject of discussion between the American and British governments.

"On the part of the United States Government, this right is rested on the same grounds of natural right and obvious necessity which had formerly been urged in respect to the river Mississippi. The dispute between different European powers respecting the navigation of the Scheldt, in 1784, was also referred to in the correspondence on this subject; and the case of that river was distinguished from that of the St. Lawrence by its peculiar circumstances. Among others, it is known to have been alleged by the Dutch, that the whole course of the two branches of this river which passes within the dominions of

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Holland, was entirely artificial; that it owed its existence to the skill and labour of Dutchmen; that its banks had been erected and maintained by them at a great expense.

"Hence, probably, the motive for that stipulation in the treaty of Westphalia, that the lower Scheldt, with the canals of Sas and Swien, and other mouths of the sea adjoining them, should be kept closed on the side belonging to Holland. But the case of the St. Lawrence was totally different, and the principles on which its free navigation was maintained by the United States had recently received an unequivocal confirmation in the solemn act of the principal States of Europe.

"In the treaties concluded at the Congress of Vienna, it had been stipulated that the navigation of the Rhine, the Neckar, the Mayn, the Moselle, the Maese, and the Scheldt, should be free to all nations. These stipulations, to which Great Britain was a party, might be considered as an indication of the present judgment of Europe upon the general question.

"The importance of the present claim might be estimated by the fact that the inhabitants of at least eight States of the American Union, besides the territory of Michigan, had an immediate interest in it, besides the prospective interests of other parts connected with this river, and the inland seas through which it communicates with the ocean. The right of this great and growing population to the use of this its only natural outlet to the ocean, was supported by the same principles and authorities which had been urged by Mr. Jefferson in the negotiation with Spain respecting the navigation of the river Mississippi. The present claim was also fortified by the consideration that this navigation was, before the war of the American Revolution, the common property of all the British subjects inhabiting this continent, having been acquired from France by the united exertions of the Mother Country and the Colonies in the war of 1756. The claim of the United States to the free navigation of the St. Lawrence was of the same nature with that of Great Britain to the navigation of the Mississippi, as recognized by the 7th article of the Treaty of Paris in 1763, when the mouth and lower shores of that river were held by another power. The claim, whilst necessary to the United States, was not injurious to Great Britain, nor could it violate any of her just rights.

"On the part of the British Government, the claim was considered as involving the question whether a perfect right to the free navigation of the River St. Lawrence could be maintained according to the principles and practice of the law of nations.

"The liberty of passage to be enjoyed by any one nation through the dominions of another, was treated by the most eminent writers on public law, as a qualified occa-

sional exception to the paramount rights of property.

"They made no distinction between the right of passage by a river, flowing from the possessions of one nation through those of another to the ocean, and the same right to be enjoyed by means of any highway, whether of land or water, generally accessible to the inhabitants of the earth. The right of passage then, must hold good for other purposes besides those of trade,—for objects of war as well as for objects of peace,—for all nations, not less than for any nation in particular,—and be attached to artificial as well as to natural highways. The principle could not therefore be insisted on by the American Government unless it was prepared to apply the same principle by reciprocity, in favour of British subjects, to the navigation of the Mississippi and the Hudson, access to which from Canada might be obtained by a few miles of land carriage, or by the artificial communications created by the canals of New York and Ohio. Hence the necessity which has been felt by the writers on public law, of controlling the operation of a principle so extensive and dangerous, by restricting the right of transit to purposes of *innocent* utility, to be exclusively determined by the local sovereign. Hence the right in question is termed by them an *imperfect* right.

"But there was nothing in these writers, or in the stipulations or treaties of Vienna, respecting the navigation of the great rivers of Germany, to countenance the American doctrine of an absolute natural right. These stipulations were the result of mutual consent, founded on considerations of mutual interest, growing out of the relative situation of the different States concerned in this navigation. The same observation would apply to the various conventional regulations which had been, at different periods, applied to the navigation of the River Mississippi. As to any supposed right received from the simultaneous acquisition of the St. Lawrence by the British American people, it could not be allowed to have survived the treaty of 1783, by which the independence of the United States was acknowledged, and a partition of the British dominions in North America was made between the new government and that of another country.

"To this argument it was replied, on the part of the United States, that if the St. Lawrence were regarded as a *strait*, connecting navigable seas, as it ought properly to be, there would be less controversy. The principle on which the right to navigate straits depends, is, that they are accessorial to those seas which they unite, and the right of navigating which is not exclusive, but common to all nations; the right to navigate the seas drawing after it that of passing the straits.

"The United States and Great Britain have between them the exclusive right of navigating the lakes. The St. Lawrence connects

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them with the ocean. The right to navigate both (the lakes and the ocean), includes that of passing from one to the other through the natural link.

"Was it then reasonable or just that one of the two co-proprietors of the lakes should altogether exclude his associate from the use of a common bounty of nature, necessary to the full enjoyment of them?"

"The distinction between the right of passage claimed by one nation through the territories of another, on land, and that on navigable water, though not always clearly marked by the writers on public law, has a manifest existence in the nature of things.

"In the former case, the passage can hardly ever take place, especially if it be of numerous bodies, without some detriment or inconvenience to the State whose territory is traversed. But in the case of a passage on water, no such injury is sustained. The American Government did not mean to contend for any principle, the benefit of which, in analogous circumstances, it would deny to Great Britain.

"If, therefore, in the further progress of discovery, a connection should be developed between the River Mississippi and Upper Canada, similar to that which exists between the United States and the St. Lawrence, the American Government would be always ready to apply, in respect to the Mississippi, the same principles it contends for in respect to the St. Lawrence.

"But the case of rivers which rise and debouch altogether within the limits of the same nation, ought not to be confounded with those which, having their sources and navigable portions of their streams in States above, finally discharge themselves within the limits of other States below.

"In the former case, the question as to opening the navigation to other nations, depended upon the same considerations which might influence the regulation of other commercial intercourse with foreign States, and was to be exclusively determined by the local sovereign. But in respect to the latter, the free navigation of the river was a natural right in the upper inhabitants, of which they could not entirely be deprived by the arbitrary caprice of the lower State. Nor was the fact of subjecting the use of this right to treaty regulations, as was proposed at Vienna to be done in respect to the navigation of the European rivers, sufficient to prove that the origin of the right was conventional and not natural. It often happened to be highly convenient, if not sometimes indispensable, to avoid controversies by prescribing certain rules for the enjoyment of a natural right.

"The law of nature, though sufficiently intelligible in its great outlines and general purposes, does not always reach every minute detail which is called for by the complicated wants and varieties of modern navigation and commerce. Hence the right of navigating the

ocean itself, in many instances, principally incident to a state of war, is subjected by innumerable treaties, to various regulations. These regulations—the transactions of Vienna, and other analogous stipulations—should be regarded only as the spontaneous homage of man to the paramount Lawgiver of the universe, by delivering His great works from the artificial shackles and selfish contrivances to which they have been arbitrarily and unjustly subjected."

DESCRIPTION OF THE COURSE OF THE RIVER ST. LAWRENCE, AND OF THE ST. LAWRENCE AND WELLAND CANALS.

The St. Lawrence ceases to be the boundary between the United States and Canada at or near St. Regis, an Indian village situated about sixty miles above Montreal. To the west of that place the northern shores of the river, Lake Ontario and Lake Erie belong to Canada, the southern to the United States. From St. Regis eastward the territory on both sides of the river belongs to Canada. Between St. Regis and Montreal are the Cedars, Cascade and Lachine rapids, all navigable by vessels of small draft of water descending to the sea, but unnavigable by all vessels ascending. The Beauharnois and Lachine canals have been built on Canadian territory, enabling vessels going up the river to pass from Montreal to St. Regis. The Cornwall canal is also on Canadian territory, but the Longue Sault, which it enables vessels to pass, is above St. Regis, and consequently is owned on the south *ad flum aquæ* by the United States. Between Lakes Erie and Ontario the river precipitates itself over the Falls of Niagara. On Canadian territory is the Welland canal, affording means of communication for schooners and propellers of moderate size, between those lakes.

AUTHORITIES ON THE QUESTION OF FREE NAVIGATION OF RIVERS.

By the Roman law rivers were public, that is to say, belonged to the particular people through whose territory they flowed, but could be used and enjoyed by all men: the use of their banks also was public.

"*Riparum quoque usus publicus est juris gentium, sicut ipsius fluminis. Itaque navem ad eas adplicare, funes arboribus ibi natis religare, onus aliquod in his reponere cuilibet liberum est sicut per ipsum flumen navigare; sed proprietates earum illorum est quorum prædii hærent; qua de causa arbores quoque in iisdem natæ eorundem sunt.*"*

The doctrine in England, from a period anterior to the publication of Selden's "*Mare Clausum*," has been, not only that certain portions of the open sea can be reduced into the absolute possession of a nation, but that all straits and rivers running through its territory belong to the nation in absolute property. Writers upon international law term

* Ins. lib. 2, tit. 1, § 4.

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this right that of exclusive use, but at bottom the right claimed and exercised is not the less one of absolute property.*

Of late years the question of the free navigation of rivers flowing through conterminous States has frequently been considered, and many treaties have been made regulating such navigation, to which several of the States of Europe and America have become parties:

Treaty of Paris, 30th May, 1814.

" " 30th March, 1868.

" " 1763.

" " 1783.

Art. 109 de l'acte finale du Congrès de Vienne du 9 juin 1815, concernant la navigation fluviale.

Acte de navigation due Danube, signé le 7 Nov. 1867, Art. 1.

Treaty between Austria and the Duchies of Parma and Modena of the 3rd July, 1849.

Treaties of 12th and 13th October, 1851, of Rio Janeiro.

Treaty of 10th July, 1853, between General Urquiza and the representatives of France, Great Britain, and the United States.

Decret du 10 Oct., 1853 de la bande Oriental.

Treaty between Brazil and Peru of 23rd Oct., 1851.†

The rights of States holding territories on rivers, as the United States and Canada do on the St. Lawrence, are treated in the following manner by the text writers:

"En vertu de ce principe l'état pourra exercer une surveillance et une police pour régler la navigation du fleuve; et pourra pourvoir, par des règlements opportuns, à concilier l'intérêt de sa sûreté avec le droit des autres nations de se servir du fleuve comme d'un moyen de communication; mais il ne pourra pas défendre positivement aux autres nations la navigation sur ce fleuve."‡

"Si le fleuve parcourt ou baigne plusieurs territoires, les Etats riverains se trouvent dans une communion naturelle à l'égard de la propriété et de l'usage des eaux, sauf la souveraineté de chaque Etat sur tout l'étendue du fleuve, depuis l'endroit où il atteint le territoire jusqu'au point où il le quitte. Aucun de ces Etats ne pourra donc porter atteinte aux droits des autres; chacun doit même contribuer à la conservation du cours d'eau dans les limites de sa souveraineté et le faire parvenir à son voisin. De l'autre part chacun d'eux, de même que le propriétaire unique d'un fleuve, pourrait '*stricto jure*' affecter les eaux à ses propres usages et à ceux de ses regni coles, et en exclure les autres."§

* See 1 Twiss p. 109.

† See Carathéodory "Du Droit International concernant les Grands Cours d'Eau," pp. 112—151.

‡ 1 Flore Nouveau Droit International, p. 357.

§ Heffter, § 77, p. 155. See Klüber, § 78; Bluntschli, § 319, 322; 1 Ortolan Dip. de la Mer. p. 148; 1 Kent, pp. 35, 36; Wolsey, § 58.

Wheaton thus expresses himself of what is called "the right of innocent use."

"Things of which the use is inexhaustible, such as the sea and running water, cannot be so appropriated as to exclude others from using those elements in any manner which does not occasion a loss or inconvenience to the proprietor. This is what is called an innocent use. Thus we have seen that the jurisdiction possessed by one nation over sounds, straits, and other arms of the sea, leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications. The same principle is applicable to rivers flowing from one State through the territory of another into the sea, or into the territory of a third State. The right of navigating for commercial purposes a river which flows through the territory of different States, is common to all the nations inhabiting the different parts of the banks; but this right of innocent passage being what the text writers call an *imperfect* right, its exercise is necessarily modified by the safety and convenience of the State affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise."*

APPLICATION OF AUTHORITIES TO QUESTION.

The publicists who favour the doctrine of free navigation of straits running through different States, found their opinions upon the principle, that such straits were made and intended by nature to serve as channels of communication between navigable seas, the common property of all nations. The basis of the American claim to the free navigation of the St. Lawrence is, that nature intended that river as the channel of communication between the Atlantic Ocean, the common property of all peoples, and the great lakes, the joint property of Great Britain and the United States.

The right then of free navigation of the St. Lawrence depends upon the fact of that river being a natural channel of communication between the Atlantic Ocean and the great lakes. If it be not such natural channel, the American claim to its free navigation must be pronounced unfounded.

In order that a strait may be a channel of communication between seas, it must be navigable. If by nature it be not navigable, it cannot be a channel of communication between seas. Therefore no right can exist to navigate an unnavigable strait.

The first point then to be established as the basis of the American claim to the navigation of the St. Lawrence from St. Regis to the ocean, is the navigability of that river in all its course through Canadian territory.

It has already been shewn that at three places between St. Regis and Montreal, the St. Lawrence is unnavigable by ascending

* Laurence's Wheaton, ed. 1803, p. 346, § 12.

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vessels, though navigable by those of a light draught of water descending. It cannot therefore be considered navigable in the full sense of the term, owing to the impossibility of its being used as a channel of communication from the Ocean to St. Regis. The right of the Americans then being measured by the natural facilities of its course for navigation, it may safely be laid down that they have a right to its navigation down to the Ocean, but have no right to navigate it from the Ocean to St. Regis.

Granting, then, the right of navigation from St. Regis to the Atlantic Ocean to the Americans, it remains to be seen whether it can be exercised independently of the Government of Canada.

From the authorities already cited, it is apparent that vessels passing through a navigable strait are subject to the sovereignty of the State to which the strait belongs. The right of passage exists in favour of the foreign vessel, the rights of jurisdiction and sovereignty of such State are unimpaired in every other particular. A State has the right of taking such precautions as may be necessary for self-defence, and the preservation of its revenues and rights within its own territory. The right to search neutral vessels on the high seas exists in favour of belligerents. The right to search all vessels coming into its maritime territory exists in favour of each State in the world, as well in peace as in war time. A State owning a strait has therefore at all times the right of search over passing vessels, and can take such precautions as may be necessary to insure that such passage be not productive of harm to itself. As a natural consequence of the principle, foreign vessels have but the right of innocent passage through such strait, and must submit to the regulations made by the State proprietor, to prevent their abusing the privilege accorded.

The pretension of the British Government in 1826 as to the right of passage through such strait being but an imperfect right, is incontestable.

The navigation downwards of the St. Lawrence would be of but little use to the inhabitants of the United States, if it were impossible for their vessels to make return voyages through the Gulf to the great lakes. The St. Lawrence presents insuperable obstacles to vessels trying to ascend the channel between Montreal and St. Regis. The canals on Canadian territory alone enable vessels to take advantage of the navigable, and to avoid the unnavigable portions of the river, and thus make the upward passage to United States territory.

Without the right of navigating the canals, that of navigating the St. Lawrence would be almost worthless. As yet no direct claim of right to such canal navigation has been advanced by the United States; but in the claim so persistently pressed for many years is concealed in embryo that to the navigation

of the canals, to be brought forth at the proper moment.

The foundation whereon reposes the American claim to the navigation of the St. Lawrence from St. Regis downwards is, that that river is the natural channel of communication for vessels from the great lakes to the Ocean, and that it is impossible to make use of such channel without navigating that portion of the river which flows through Canada. Thus the impossibility of passing over United States territory forms part of the corner-stone of the right of United States vessels to pass over Canadian territory, in making use of a bounty of nature.

But above St. Regis, Canadian and United States vessels have equal rights in the navigation of the river, each country owning one of the banks. There are no canals in United States territory, whilst on Canadian soil canals have been made by which vessels can avoid the Longue Sault rapids and the unnavigable parts of the Niagara river, and thus pass with ease from St. Regis up the St. Lawrence to Lake Ontario, and thence through the Welland canal to Lake Erie.

The first objection to the claim to navigate the canals is, that the basis on which rests the American right to navigate the St. Lawrence, viz.: that that river is a natural channel of communication between the great lakes and the sea, does not support a right to navigate artificial canals. It may be urged that they are accessional to the navigation of the river, that having been erected by the government with the intention of thereby overcoming the difficulties of navigation, they are dedicated to the public use of all entitled to exercise the right of navigating the St. Lawrence; that the Americans have the same rights of navigation of the St. Lawrence as British subjects, and consequently they have the same rights in the Canadian canals. On the other hand, it may be urged that the Canadian canals are built on Canadian soil, over which the Americans never possessed any rights; that being superstructures on land, they are owned by the proprietors of the land on which they are built; that having been erected by Canadian labour and capital, they follow the natural order of things and belong to those who built them; that the facts of their having been erected by the State and destined to public use do not give any right to foreign nations freely to navigate them, as in such case the use contemplated was merely that by British subjects; that canals do not necessarily, any more than railroads, by the law of nature, form portions of the public property of the State within which they are built, and that consequently when they are private property no foreign State can possess even a right of servitude upon them, and that to canals generally; the principle of the Roman law which submitted its banks to the use of vessels navigating the river, never has been and cannot now be extended.

ALABAMA QUESTION.—PROFESSIONAL ETHICS, &c.

If the claim to navigate the canals of Canada be admitted, on the same principle the Erie and the Whitehall canals should also be thrown open to Canadian vessels.

But the impossibility, which may be urged so far as the Cedars, Cascades and Lachine Rapids are concerned, of the United States making canals on their own territory by which those rapids may be avoided, cannot be pleaded in favour of the claim to the navigation of the Cornwall and Welland Canals. The south banks of the St. Lawrence and the Niagara belonging to the United States, canals might be built thereon, affording to American citizens the same facilities now presented by the Cornwall and Welland Canals to British subjects. If then canals are not in existence on those banks, the United States cannot turn their want of enterprise to advantage by claiming a portion of the benefits secured to British subjects by the enterprise and expenditure of the Canadian government, and insist upon a right to navigate the Welland and Cornwall Canals.

A great deal of ridicule was wasted upon the President's desire, as it was said, to navigate the Falls of Niagara, but it is perfectly clear that the claim advanced was merely to the navigation of the St. Lawrence between St. Regis and the sea.

The President endeavours to fortify his position by referring to the treaties regulating the navigation of the Rhine, Danube, and other rivers in Europe and America. Such treaties, he pretends, show the judgment of jurists and statesmen on the subject; so far as regards the expediency of throwing open the rivers in question to navigation he is correct in his pretensions, but with regard to the rights of other nations to navigate a river or part of a river, exclusively the property of one State, he is wrong. Principles of international law are not created by treaties. That law in its entirety was in existence ere men had banded into tribes; it has ever been and shall ever be immutable. Man sees but dimly in this world and has discovered but few of its principles, whereof still fewer are universally admitted, but as well deny that the laws of gravitation had existence before Newton, as affirm that God, ere nations were known, had not framed a perfect code of laws for their government.

But the treaties referred to have really no bearing on the pretensions advanced: 1st. because none of them apply to a river similar in its nature to the St. Lawrence; 2nd. because they all apply to rivers, only from the points where they first become navigable to the sea.—*La Revue Critique*.

An opinion given by law officers of the Crown at the request of Mr. Canning nearly fifty years ago, concerning the question of the liability of the British Government for damages in cases analogous to that of the *Alabama*, is interesting in connection with the

Washington Treaty. It runs thus:—"The strongest suspicion that a vessel building in a port of this country or about to proceed to sea, is destined to be armed elsewhere, and to become a vessel of war in the service of a belligerent—the strongest suspicion that a particular cargo of arms, sailing from a port of this country, is destined for the purpose of arming that very vessel in a foreign port, would not justify the Government either in detaining the vessel or in seizing the arms, the vessel herself sailing unarmed, and the cargo of arms being entered at the custom-house as merchandise. The law applies only to what can be proved, and the attempt to execute it without proof would expose the officers of Government to heavy pecuniary damages.—(Signed), CHR. ROBINSON, D.C.L., King's Advocate; J. S. COPLEY, Attorney-General; CHARLES WETHERELL, Solicitor-General."—*Law Times*.

PROFESSIONAL ETHICS.—The following is now so old, that it may be given to some few perhaps as new, and it is quite good enough to be read a second time. A contemporary, in re-publishing it, calls it "Legal Ethics in one easy Lesson:"—

I asked him whether, as a moralist, he did not think that the practice of the law in some degree hurt the nice feeling of honesty.

Johnson: Why no, sir, if you act properly; you are not to deceive your clients with false representations of your opinion; you are not to tell lies to a judge.

Boswell: But what do you think of supporting a cause which you know to be bad?

Johnson: Sir, you do not know it to be good or bad till the judge determines it. I have said that you are to state facts fairly, so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself may convince the judge to whom you urge it, and if it does convince him, why, then, sir, you are wrong and he is right. It is his business to judge, and you are not to be confident in your own opinion that, a cause is bad, but to say all you can for your client, and then hear the judge's opinion.

Boswell: But, sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life in the intercourse with his friends?

Johnson: Why no, sir, every body knows you are paid for affecting warmth for your client, and it is, therefore, properly no dissimulation; the moment you come from the bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the bar into the common intercourse of society than a man who is paid for tumbling upon his hands will continue to tumble upon his hands when he should walk on his feet.—*Boswell's Life of Johnson*.

Prac. Court.]

LUTZ v. BEADLE.

[Prac. Court.

ONTARIO REPORTS.

PRACTICE COURT.

LUTZ v. BEADLE.

Ejectment—Order for costs—Purchaser after action brought.

In an action of ejectment, the defendant appeared and claimed title as tenant of one R. Two days before appearance, R. had disposed of his interest in the lands to S., who, after notice of trial, applied on affidavits setting out the conveyance and the subsequent allotment to him of defendant (now his lessee) to be admitted, as landlord, to defend the action; but the application, being opposed by the plaintiff, was refused.

Plaintiff having succeeded, applied for a rule ordering S. to pay the costs of the action, on the ground that the defendant was insolvent, and the conduct of S. in making the above application, as well as at the trial and subsequently thereto, proved him to be the real defendant.

Held, that plaintiff was not estopped from making such an application, by having opposed the prior application of S., and the rule was made absolute.

[Practice Court, E. T., 34 Vic.—Gwynne, J.]

This was an action of ejectment in which judgment was obtained by the plaintiff.

Freeman, Q. C., during last term, obtained a rule upon one Simeon Cline, to shew cause why he should not be ordered to pay the costs of the plaintiff in the suit, upon the ground that the defendant was only nominally interested as tenant of Simeon Cline, and that the suit was defended in the interest of, and for the benefit of the said Cline.

F. A. Read shewed cause.

The facts sufficiently appear in the judgment.

June 24.—Judgment was now delivered by

GWYNNE, J.—The cases of *Hutchinson v. Greenwood*, 4 E. & B. 324, 24 L. J. Q. B. 2; *Anstey v. Edwards*, 16 C. B. 212, and *Mobbs v. Vandenberg*, 33 L. J. Q. B. 177, sufficiently establish that the court has jurisdiction to make the order asked for, under the 77th section of the Consolidated Statutes of U. C., ch. 27, notwithstanding that the action of ejectment is no longer a fictitious one. The only question, therefore, appears to be, whether it is or is not proper, that under the circumstances appearing, I should exercise that jurisdiction. By the affidavits filed on the part of the plaintiff, it appears that the action was commenced on the 23rd day of April, 1869, and was entered for trial at Hamilton in the fall of that year. An appearance was entered for the defendant on the 10th day of May, 1869. With this appearance was filed a notice to the effect that, besides denying the plaintiff's title, the defendant claimed to be entitled to the possession of the said lands as tenant of Ransom Cline. In the month of October, 1869, and just before the cause was entered for trial, Simeon Cline applied to be made a defendant in the cause jointly with the defendant Beadle. In an affidavit made by him upon that application, a copy of which was filed in support of the present application, after setting out the service of the writ upon Beadle, his appearance, and notice of claim as above, he swore that on the 8th day of May, 1869, he, Simeon, purchased the interest of Ransom Cline in the said lands, and that, on the 17th day of June following, the said Beadle attorned to, and became tenant of the said lands under Simeon, and accepted a lease thereof from him for the term of one year, at the yearly rent

of one dollar; that Ransom Cline had not appeared to the said action; that he, Simeon, was then in the possession of the land by his tenant, the defendant, Beadle; and that notice of trial had been served on the 29th September, for the then next assizes, to be held in the County of Wentworth, on the 11th of October then instant.

This application, being opposed by the plaintiff's attorney upon the ground that Simeon had purchased after action brought, was refused.

In the plaintiff's affidavit, filed upon the present motion, he swore that Simeon Cline attended at the trial, which took place in the month of April, 1870, and that he appeared to be the only person interested in the defence; that he was instructing the attorney and counsel for the defendant, and looking after the witnesses, and taking on himself the entire management of the cause; and that plaintiff believes that throughout the whole progress of the suit, or, at all events, since he purchased the alleged interest of Ransom Cline, in May, 1869, as stated in his own affidavit, he has been the only person who has given instructions for the defence of the suit, and who has been really interested in the result thereof. The plaintiff further swore that at the trial, neither the defendant, nor Ransom Cline, who is a brother of Simeon, appeared to have anything to do with the suit, except as witnesses; that the defendant, Beadle, is hopelessly insolvent, and has no property whatever out of which the plaintiff can recover his costs of suit; and that several times since the commencement of the suit, Simeon Cline has told the plaintiff that he, Simeon, claimed the property as his own; and that since the trial, he has said to the plaintiff that he would yet have the property, and that he would not submit to the verdict rendered.

Simeon Cline filed no affidavit of his own in answer to this application, but an affidavit of the attorney of the defendant on the record was filed, and he swore that, on the 7th day of May, 1869, he was retained and employed by the defendant, Beadle, and by Ransom Cline, who then claimed to be the owner of the property in question in the cause, and from whom the defendant, Beadle, leased the same,—as attorney to defend the suit. That he entered an appearance for the defendant on the 10th May, 1869, and at the same time served a notice of claim of title under Ransom, which he set out at large, and which is to the effect stated by plaintiff in his affidavit. The attorney further swore, that he never knew Simeon Cline in any way in the matter of the suit up to the 21st day of May, 1869; nor did he ever receive instructions of any kind from him in the above suit, previous to the said 21st day of May, 1869. This is the only affidavit used in answer to the notice.

I was asked by Mr. Freeman also to notice judicially the evidence taken at the trial, and which was before the Court of Common Pleas on a motion to set aside the verdict, (upon which motion judgment has been given sustaining the verdict,) with a view to seeing that the defendant was put forward solely for the purpose of asserting the title which Simeon Cline claimed at the trial, and that the whole defence was in his interest. On the other hand, Mr. Read ob-

Prac. Court.]

LUTZ V. BEADLE.—IN RE ROBERTS AND HOLLAND.

[Cham. Rep.]

jected, that I should only look to the matters brought before me on affidavit on this application.

I think there is sufficient before me on this application to determine the point: Simeon Cline making no affidavit himself, and his affidavit made in October, 1869, expressly states that he asserts title in himself, and that the defendant was only in possession as his tenant; and the affidavit of the attorney on the record admits, as I take it to admit, in effect, that his original instructions were from Ransom Cline, whose interest Simeon Cline acquired by a purchase made before appearance entered, and that since the 21st day of May, 1869, before ever Beadle attorned to Simeon, or took the lease for a year at \$1 rent, he had taken his instructions from Simeon; I take it to be established beyond all doubt, that Beadle has been throughout only nominally a defendant, and that the defence has wholly been made by and in the interest of Simeon Cline.

The case which is established is, then, the common case for making the order asked for, unless the fact that the plaintiff by his attorney opposed Simeon's application to be admitted to defend as landlord, is subversive of his claim to have his present motion granted, and this, in fact, was the only ground upon which the rule was opposed.

No case has been cited to me in support of this contention, and upon reflection, I do not think that the fact of the plaintiff having opposed the former application, should prejudice the present one. He may possibly have thought that the alleged sale to Simeon Cline was a fraudulent contrivance, and that it was still Ransom who claimed the property, and he may have wished to retain a claim upon him; but it now appearing that it is Simeon who really defended in his own interest, he seeks to make him responsible. Simeon, by making the application to defend, admitted his liability for the costs of the defendant in right of the interest which he claimed in the property. Had he been admitted to defend, he would have been subject to the costs, and liable to pay them, because of such his alleged interest, and of the defence made upon behalf thereof.

Although not admitted to defend, Simeon's interest has remained the same, and he has had the benefit of asserting his claim to the property, to the same extent precisely as if he had been a defendant. The defence made to the suit has been no less his defence, and in his interest, than it would have been if he had been a defendant on the record. He has had the full benefit of the defence, as if he had been admitted a defendant on the record, and I cannot see any reason, why, having enjoyed this benefit, he should not also bear the burthen. He must be clearly liable to the plaintiff, unless the latter's opposition to his application operates as an estoppel to his making the present motion, and I cannot see that it should be held so to operate.

In justice therefore, I think the rule must be made absolute.

Rule absolute.

COMMON LAW CHAMBERS.

IN RE ROBERTS AND HOLLAND.

Fence-viewers—Watercourses—Contiguous lots.

To constitute a "joint interest" within the meaning of sec. 7, C. S. U. C. C. 57, it is not necessary that the lands occupied should be contiguous lots.

The question whether such interest exists is to be determined entirely by the fence-viewers, and Their discretion cannot be reviewed if fairly and reasonably exercised.*

Semble, the absence of a demand under section 15, may be waived by the subsequent conduct of the parties.

[Chambers, March 19, 1871.—WILSON, J.]

A summons was taken out on the 26th of February, 1871, calling on Robert Dale, clerk of the seventh division court of the County of Lambton, and John Coulter, the bailiff of the said court, to shew cause why a writ of prohibition should not issue to prohibit the said clerk from issuing execution against the goods and chattels of Patrick Holland and Charles Holland, according to the determination of fence-viewers in a matter of dispute between the said James Roberts and the said Patrick Holland and Charles Holland, and why the execution of the said writ of execution, if issued, should not be restrained, upon the ground that the clerk of the court had no jurisdiction to issue the said execution; that the alleged award or determination of fence-viewers was void, and on grounds disclosed in affidavits and papers filed.

The proceedings shewed that on the 5th of June, 1870, Joshua Payne, a justice of the peace, summoned Patrick Holland and Charles Holland to attend, on the 11th of the month, on lot No. 27 in the 3rd concession of the township of Moore, then and there to meet three fence-viewers of the township, to shew cause why they, the said Patrick Holland and Charles Holland, refused or neglected to open up a fair portion of a regular watercourse running across the said lot.

The three fence-viewers, Peter Scott, John Maguire and Thomas Boulton, on the 14th June, made their award. The award recites that they, the fence-viewers, had been summoned by James Roberts, on lot No. 28, in the 4th concession of Moore, to examine a watercourse running across the west half of lot No. 27, in the 4th concession, owned by Robert Cathcart, and also across lot 27, in the 3rd concession, owned by Patrick Holland and Charles Holland, and that they found on examining the said watercourse that "this is the proper course for the water running from James Roberts' land;" then they awarded that a ditch should be opened across the said lots—the ditch to be six feet wide on top, eighteen inches deep, and three feet wide at bottom, the earth to be kept four feet from the side of the ditch—commencing at a certain stake on the side line between lots 27 and 28, in the 4th concession, following the natural course of the water, as already marked out by the fence-viewers, measuring 320 rods from the said stake; and that the first 80 rods, next the side line, should be opened by James Roberts, the second 80 rods by Robert Cathcart, the third 80 rods by Patrick Holland, and the fourth 80 rods by Charles Holland—the whole to be finished by the 20th of August, 1870.

* But see *Re Cameron & Kerr*, 25 U. C. Q. B. 533; *Re McDonald & Cattinach*, 5 Prac. Rep. 288; 39 U. C. Q. B. 432.—Eds. L. J.

Cham. Rep.]

IN RE ROBERTS AND HOLLAND.

[Cham. Rep.]

It was further awarded that if any of the said parties should neglect or refuse to open his share of the ditch allotted to him within the above date, any of the other parties might, after first completing his own share, open the share allotted to the party in default, and be entitled to receive not exceeding 40 cents per rod for the same from the party in default; and they awarded that all the costs of the fence-viewers should be paid by James Roberts.

On the 25th of November, 1870, Matthias Ross, Alexander Jenkins and John Reynolds, three other fence-viewers made an award, which after reciting that they had been required by summons issued by G. B. Johnston, a justice of the peace, to examine a ditch in dispute on lot 27, in the 3rd concession of Moore, between Patrick and Charles Holland, complainants, and James Roberts, defendant, stated that they had examined the ditch in dispute, dug by award of fence-viewers, made the 14th of June, 1870, and that they could see no benefit that complainants received or could thereafter receive from the ditch, for the following reasons:

1. The ditch had been carried on an angle across unimproved land, and nearly parallel with the main channel of the west branch of Clay Creek.

2. It has not been carried on direct to the main, most direct, or shortest channel to an outlet.

3. Had James Roberts turned easterly 138 rods from the present outlet, and at a stake put down by them (the last-named fence-viewers), and dug 50 rods, he would have had as good an outlet and have saved 88 rods of digging in the present ditch: both outlets in same creek.

They (the last-named arbitrators) therefore awarded that all expenses of digging the said ditch in dispute should be paid by Jas. Roberts, who was forcing the ditch for his own direct benefit, and that he should also pay all expenses attending this examination and rendering this award.

On the 5th of December, 1870, Mr. Payne, the magistrate, notified Patrick and Charles Holland to attend on lot 27, in the 3rd concession of Moore, and there meet the three fence-viewers on the 10th of December, at 11 A.M., and shew cause why they refused to pay their fair portion of a ditch running on their lot, awarded by the said three fence-viewers on the 14th of June, 1870.

On the 12th December, 1870, the first fence-viewers, Scott, Boulton and Maguire, addressed a notice to Patrick and Charles Holland, to the effect that having been called by summons to appear on the lots of Patrick and Chas. Holland to examine the outlet running through lot 27, in the 4th concession, and lot 27 in the 3rd concession of Moore, the said outlet having been awarded by them on the 14th of June, 1870, they found that James Roberts had finished the whole of the outlet according to the award—eighty rods being his own share and eighty rods the share of Robert Cathcart; and that they found James Roberts had finished the shares of Patrick and Charles Holland, being one hundred and sixty rods awarded to them, they being defaulters in respect to the aforesaid award.

On the 13th of December, 1870, Mr. Payne, the magistrate, sent a notice to the clerk of the

seventh division court, to the effect that he had sent to the clerk the decision of the three fence-viewers on the ditch between James Roberts and Patrick and Charles Holland, and that the ditch was done according to their award.

Accompanying this notice was a minute of the costs of the award, amounting to \$8 68, and of the 160 rods of ditch at 40c. per rod, \$64, in all \$70 68, exclusive of bailiff's fees, for all of which it was said Patrick and Charles Holland were defaulters, and were to pay the whole expenses.

On the 17th December, 1870, Charles Holland was served with a copy of the award and costs, and on the 19th of the same month Patrick Holland was also served.

An execution was afterwards issued by the clerk of the division court against the goods and chattels of Patrick and Charles Holland, and delivered to the bailiff to be executed.

Mr. Francis, a surveyor, on 29th October, 1870, certified to Patrick Holland that in his opinion the water had not been taken down its proper channel according to the award, but diverted from it, and that lot 28 in the 4th concession, could, in his opinion, be drained cheaper and quicker than in the way proposed by the fence-viewers, and that it was not to the joint interest of the parties mentioned in the award to have the ditch made.

Charles Holland, on 30th January, 1871, made affidavit that he attended on lot 27 in the 3rd concession of Moore, on the 10th December, 1870, at the hour named in the notice, but did not meet the fence-viewers nor any person representing them. That the award ordering the money to be paid was made on the 12th of December, and that the ditch was not dug till the 14th of December, and was not finished up to the present time (the date of his affidavit, 30th January, 1871); and that the ditch runs about 8 rods through the west hundred acres of 27, in the 3rd concession, being that portion of the lot owned by him.

Patrick Holland, by his affidavit made the 21st of January, 1871, said he attended the arbitrators with his witnesses, but no evidence was taken to shew the proper course of the water. Feeling aggrieved by the award made by Scott, Maguire and Boulton, he got other three fence-viewers, Ross, Jenkins and Reynolds, and they made their award: that the defendant's land and the land of Charles Holland are not adjacent or adjoining to the land of Roberts: that the course which Roberts wishes to take is not the natural outlet for the water: that the ditch as dug is a direct injury to defendant, as it overflows his land: that no demand was made on him to dig the ditch: and that the ditch is not according to the award of the fence-viewers.

Benjamin Milligan, John Milligan and Charles Coyle also swear the ditch is no benefit but an injury to the Hollands: that the ditch is not eighteen inches deep through Holland's land, nor six feet wide at the top, and the clay is not four feet from the edge: that the ditch causes a large flow of water through the lands of the Hollands, brought from the side line ditch: and that the distance from the commencement of the ditch to the boundary line of the Hollands' lands is 120 rods.

Charles Holland confirmed Patrick's affidavit. *G. D. Boulton* showed cause.

The award is made in accordance with the statute. The directions have all been carefully followed. The clerk of the court was the proper person to issue the process. The merits cannot now be disputed. The fence-viewers were the proper judges of all such matters, and all that can now be done is to try whether the proceedings which are disputed were legal or illegal. He referred to C.S.U.C. c. 57, s. 7; *Siddall v. Gibson*, 17 U. C. Q. B. 98.

Harrison, Q. C., contra, appeared for Patrick Holland only.

1. Patrick Holland was not an adjoining proprietor of Roberts.

2. Patrick Holland had not a joint interest with Roberts in the making of the drain.

3. No demand was made on Patrick Holland to do his work according to secs. 14 & 15 of the Act, before the work was done.

4. Then it appears Charles Holland appeared to the magistrate's summons, under sec. 16, requiring him to attend on the 10th of December, but the fence-viewers were not present, and so he has never refused to pay, nor been a defaulter in any form: *Murray v. Dawson*, 17 U. C. C. P. 588; 19 U. C. C. P. 314; *Dawson v. Murray*, 29 U. C. Q. B. 464.

WILSON, J.—It appears that Roberts lives on lot 28, in the 4th concession of Moore. The drain "taps the side line ditch dug by the municipal council through the third and fourth concessions, and from there runs 120 rods to the boundary line of the east half of 27 in the 3rd concession." Robert Cathcart lives on 28, in the 4th concession, to the east of Roberts, and some one, not named, lives on 28 in the 3rd concession, to the south of Roberts. Charles Holland's land, the west half of 27 in the 3rd concession, comes at the north west angle, just opposite to the south east angle of Roberts' land, which is on the other side of the said line; and Patrick Holland's land, the east half of 27 in the 3rd concession, is all the width of Charles Holland's half lot distant from Roberts' land. From these facts it is said that the following words of the Act do not apply:

Sec. 7. "Where it is the joint interest of parties resident to open a ditch or watercourse for the purpose of letting off surplus water from swamps or low miry lands, in order to enable the owners or occupiers thereof to cultivate or improve the same, such several parties shall open a just and fair proportion of such ditch or watercourse according to their several interests."

By sec. 8 three fence-viewers are to decide all disputes between the owners or occupants of adjoining lands or lands so divided or alleged to be divided as aforesaid, in regard to their respective rights and liabilities under the Act, and all disputes respecting the opening, making or paying for ditches and watercourses under the Act.

From the facts stated, it appears Roberts desired to have surplus water let off his land. It appears also that Cathcart, to the east, has a good deal of marshy land on his lot, and that it runs down southerly upon a good deal of the north east quarter of Patrick Holland's land.

Cathcart has paid for the work done through his lot. The two Hollands have not.

It must always happen, where there are more than two lots lying the one from the other as lots in the same concession, numbering 1, 2, 3, 4, &c., that there must be some of the lots which do not touch or abut upon the other or others of them, and yet all these lots may require to be drained, or to be so grouped together as to constitute an adaptable block for the purpose of draining some one or more of them, though the others may not require the proposed drainage in any way.

The statute does not restrict the question of drainage to the owner or occupier of only the two coterminous lots, as it does when provision is made for fences.

By section 1 the enactment as to fences is—"Each of the parties occupying adjoining tracts of land shall make, keep up and repair a just proportion of the division or line fence on the line dividing such tracts, and equally on either side thereof," every word of which shews that provision is made for the line fence between the immediate occupants on each side of it.

That enactment is very different from the language of sections 7 and 8, before quoted, and the nature of the subject required that it should be different.

In my opinion then, the statute, with respect to the provisions which relate to drainage, does not require that the rights or duties of coterminous occupants can be or shall be alone considered. The interests of all those who are affected by the work may and must, I should think, be jointly considered in the one reference and award.

So far, then, I have no doubt that Roberts, Cathcart, Charles Holland and Patrick Holland, each of them representing different lots, may be brought into the same project, and have their rights severally adjudicated upon in carrying out the joint or general scheme of drainage which the fence-viewers shall decide or do decide to be for their common interest, more or less, although Patrick Holland and Roberts are not between themselves coterminous occupants.

That disposes of the first objection.

The second objection is that Patrick Holland had not a joint interest with Roberts in the making of the drain. That is a question of fact with which I have properly nothing to do. The fence-viewers or arbitrators are to decide that. If they decided persons to be jointly interested in a work of this kind who were in no sense so interested, relief must be had in some way; I do not say by application to a superior court—though possibly the proceedings may be reviewable on *certiorari*,—but by action, if a case of fraud or corruption can be established.

Here it is not said they may not be interested in the work from the juxtaposition of property, but not interested because the drain made does not drain the land of the complainant, and because it has not been cut in the place where the natural flow of water is.

These are matter of detail for the fence-viewers, whose discretion I cannot supersede or control if fairly and reasonably exercised: and I see no reason to doubt it, though the complainant and some others for him deny it.

Cham. Rep.]

IN RE ROBERTS AND HOLLAND.—DAY V. DAY.

[Eng. Rep.]

The fence-viewers are to settle what portion of the work shall be done, "according to their several interests," (sec. 7); and they are to decide all disputes between the parties "in regard to their respective rights and liabilities," (sec. 8); "and if it appears to the fence-viewers that the owner or occupier of any tract of land is not sufficiently interested in the opening of the ditch or watercourse to make him liable to perform any part thereof, and at the same time that it is necessary for the other party that the ditch should be continued across such tract, they may award the same to be done at the expense of such other party; and after such award, the last-mentioned party may open the ditch or watercourse across the tract at his own expense, without being a trespasser." (Sec. 12)

These enactments enable the fence-viewers fully and equitably to deal with all cases which are brought before them, and I cannot say they have not done so between these parties. It is not likely that Roberts would pay \$80 for doing the work he claims to be repaid for, when he can only get back and has been awarded only \$84 for it, if it were not a work beneficial for himself, at any rate; and it is not likely the fence-viewers would have awarded Patrick Holland to pay the sum if they had not thought the work to be beneficial to him.

I cannot interfere on this ground.

Thirdly, it is said no demand was made on Patrick Holland to do the work through his own land before Roberts did it for him.

Roberts swears Patrick and Charles Holland "neglected and refused up to and after the 20th of August, 1870, to do their portion of the work;" that the ditch was dug in October and November, 1870; "and both the Hollands were frequently at the ditch during the time it was being dug: and that Patrick Holland instructed the men as to the digging of the ditch."

The statute requires a demand in writing to be served on the party to do his work, and a refusal by him before the other party can do it for him—or make him pay for it. Patrick Holland says—"I told one John Walker, one of the parties digging the ditch, not to attempt to enter upon my lands to dig said ditch." It is quite clear, then, that Patrick Holland was determined not to allow Roberts to dig the ditch on his land, and I can quite believe, from this, that he refused to do the work, as Roberts swears.

I do not think I should, if I was quite certain of possessing the power, stay all proceedings because the demand had not been in writing, or even if no demand at all had been made on Patrick Holland to do the work, when it appeared he saw it done and gave directions for the doing of it, without any objection at that time. I do not interfere, then, on that ground.

The fourth ground is that Charles Holland swears that he attended at the time and place appointed on the 10th of December, 1870, to shew cause why he should not pay the sum demanded from him, "but did not meet the fence-viewers nor any person representing them."

Charles Holland had no one representing him on the return of the summons, though it seems he concurred and united in procuring it. That he was present is of no consequence, then, on this argument. Patrick Holland does not say he

was present, or if he was he does not say he did not meet the fence-viewers, nor does he say the fence-viewers were not present. Charles Holland himself does not say the fence-viewers were not present at the time and place. He says he "did not meet them nor any person representing them." That may have been because he would not meet them. The place of meeting is "on lot 27, in the 3rd concession."—rather a wide circuit. Charles lives on the west half of that lot, and he may never have left his own house, and yet have been able to make the affidavit he has made, that he did not meet the fence-viewers, though he may have seen them all the time they were upon the lot. He may not have met them because he was in his house or on another part of the lot than they were upon, and yet they may have been on the lot, and he may have seen them or known of them being there all the time.

I consider his affidavit as being intentionally so worded, in order to mislead. The difficulty has arisen, however, from the whole lot being specified as the place of meeting, instead of some determinate house or field, or other unmistakable locality.

As Patrick has made no affidavit on this point, I presume he did not attend, or that the fence-viewers did attend at the time and place appointed under section 16 of the Act, and that they did determine as they say they did, that Roberts had done the work for Charles and Patrick Holland, "being 160 rods awarded to them—said Patrick and Charles Holland being defaulters to the aforesaid award."

This last objection fails also.

I must therefore discharge the summons with costs.

Summons discharged with costs.

ENGLISH REPORTS.

PRIVY COUNCIL.*

DAY V. DAY.

Land—Statute of Limitations (3 & 4 Will. 4, c. 27). ss. 2 and 7—Tenancy at will.

A tenant at will of land, to whom the management of the land was confided, underlet a portion of the land, and transferred his interest in another portion. The letting and transfer were with the knowledge and assent of the landlord of the tenant at will. The tenant at will had already been in possession of the land for ten years, and he and his tenant and transferee were in possession for a further period of twelve years and more.

The landlord, more than twenty-one years after the commencement of the tenancy at will, obtained possession of so much of the land as the tenant at will had remained in possession of or had let.

Ejectment was brought by the tenant at will. Held, that the tenant at will was entitled to recover, the right of the landlord having been extinguished by the Statute of Limitations (3 & 4 Will. 4 c. 27), ss. 2, 7, 34, the statute running, upon the true construction of section 7† at latest at the end of the first year of the tenancy

* Present—SIR JAMES W. COLVILLE, SIR ROBERT J. PHILLIMORE, SIR JOSEPH NAPIER, Lord Justice JAMES, and Lord Justice MELLISH.

† 3 & 4 Will. c. 27, s. 7 [C. S. U. C. c. 88 s. 7], enacts that: "When any person shall be in possession of any land as tenant at will, the right of the person entitled subject thereto to make an entry . . . or bring an action to recover such land . . . shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have been determined."

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at will, even if there has been an actual determination of the tenancy, and though that actual determination of the tenancy may have taken place before twenty years have run out from the end of the first year of the tenancy. *Quære*, however, whether in the present case, by means of the letting and transferring by the tenant at will, any actual determination of the tenancy had taken place before twenty years had run out from the end of the first year of the tenancy.

[19 W. R. 1017.—P. C. C.]

This was an appeal from the Supreme Court of New South Wales in an action of ejectment.

The facts will be found fully stated in the judgment of the Judicial Committee.

July 15, 17.—*J. Brown, Q. C.*, and *Laing*, for the appellant.—It is agreed between us that the English Statute of Limitations, 8 & 4 Will. 4, c. 27, applies* as was assumed below. The true construction of the 7th section is that which was put upon it by the dissenting judge in the Court below, viz., that the statute runs in the case of a tenancy at will from the determination of the tenancy, or from the end of the first year of the tenancy, "whichever shall first happen." It can never run from a later period than the end of the first year. That the true construction of the section is such as we say, is clear, and was expressly decided in *Bennett v. Turner*, 7 M. & W. 226 (not dissented from in error, 9 M. & W. 643); *Goody v. Carter*, 9 C. B. 863. The construction put upon it by Lord St. Leonards is the same. *Sugden's Vendors and Purchasers*, vol. 2, p. 350 of 10th edition. Therefore, even if there was an actual determination of the tenancy at will in the present case by the tenant's underletting and transferring, that fact alone is immaterial. We admit that, if a tenant at will underlets, his landlord has a right to treat the tenancy as determined; but, if the landlord does not exercise his right, the tenancy remains, as in any other case of forfeiture. It is doubtful, therefore, whether in the present case there was an actual determination of the tenancy. No doubt if there was an actual determination of the tenancy, followed by the creation of a fresh tenancy, that may have been material; but a tenancy at will can only be created by actual agreement express or implied; *Ley v. Peter*, 6 W. R. 437, 3 H. & N. 101, 27 L. J. Ex. 239; and there was no evidence of such an agreement. It is clear that mere inaction of a landlord whose tenant at will had done an act determining his tenancy, cannot be construed as the grant of a fresh tenancy at will.

C. E. Pollock, Q. C., and *J. C. Day*, for the respondents.—The true construction of 8 & 4 Will. 4, ch. 27, s. 7, is that the statute is to run from the actual determination of the tenancy or from the end of the first year of the tenancy "whichever shall last happen," or that it is so to run, if there has been such an actual determination before the lapse of twenty years from the end of the first year of the tenancy. If that is not the construction of the section, then the true construction is, that the words "if there has been no actual determination of the tenancy" are to be considered as inserted, and the section is to be read thus:—The right of entry shall be deemed to have accrued either at the determina-

tion of the tenancy, or if there has been no actual determination of the tenancy (or no actual determination of the tenancy before the end of the period which would suffice to create a bar on the next following alternative) then at the expiration of one year next after the commencement of such tenancy. Either form of this construction is sufficient for us. There was not only an actual determination of the tenancy before the litigation arose but an actual determination before the end of twenty years from the end of the first year of the tenancy, i. e., before the lapse of the time sufficing to give a bar upon the second alternative. Upon this view of the section, the section intended to provide for the case where the joint will of the lessor and the tenant could not be shown to have actually ceased, and, in such a case, to feign a determination of the tenancy at the end of one year from its commencement, which, by reason of the frailty of a tenancy at will, might not be an unreasonable fiction,—the statute being left to run from the actual determination of the tenancy, where an actual determination could be shown to have taken place, or at all events where an actual determination could be shown to have taken place within twenty years from the end of the first year of the tenancy. There are, no doubt, decisions against such a construction, even in the second and modified form, but, as was said by Lord Campbell in *Randall v. Stevens*, 2 E. & B. 652, the question whether these decisions are right, is still open for consideration in a court of error. In *Doe d. Bennett v. Turner*, 7 M. & W. 226, the Court of Exchequer held that, although there had been an actual determination of the tenancy at will ten years after its commencement, the statute nevertheless ran from the end of the first year of the tenancy; but they held also that, if a second tenancy was created, the statute ran only from the second tenancy; and the Exchequer Chamber, affirming a ruling in accordance with the latter decision, expressly left the former point undecided; 3 C. 9 M. & W. 543. In *Doe d. Dayman v. Moore*, 9 Q. B. 559, Patteson, J. speaks of the judges having always avoided the point, and says he always has. In *Goody v. Carter*, 9 Q. B. 863, the decision of the Exchequer was followed; but in *Randall v. Stevens*, 2 E. & B. 641, where the point was mentioned but did not need to be decided, the Court doubted (see p. 652) whether the point had been rightly decided; and in *Locke v. Mathews*, 11 W. R. 843, 32 L. J. C. P. 98, where a fresh tenancy was created, and the statute was held to run only from the fresh tenancy, Erle, C. J., says that, on the true construction, the statute runs from the end of the first year of the tenancy only where the tenancy has continued for the whole twenty-one years, and Willes, J., agrees with that construction, saying also that it is an open question in a court of error. If this construction is right, then the appellant must fail, for the acts done by the tenant at will in letting and transferring clearly amounted in law to a determination of the tenancy, the necessary condition that they should be known to the landlord being fulfilled. It is admitted by the appellant that, if a tenant at will lets the land, the landlord has a right to treat the tenancy as determined; but they have

* The 3 & 4 Will. 4 c. 27, was adopted in New South Wales, by the Colonial Act, 8 Will. 4, No. 3. See *Devine v. Malloway*, 9 W. R. 642, 14 Moo. P. C. 290.

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contended that the act of the tenant is a cause of "forfeiture," and that therefore the landlord must exercise his right, otherwise the tenancy continues as in any other case of forfeiture. But the act of the tenant is not a cause of forfeiture. The only authority treating the unauthorised act of the tenant as operating in the way of forfeiture, as distinct from determination of joint wills, is *Blunden v. Baugh*, Cro. Car. 302; all the other authorities, beginning with *Carpenter v. Collins*, Yelv. 73, hold the tenancy not forfeited but determined. The only reason why the law requires that the landlord should know of the acts determining the tenancy, is that otherwise, when coming for his rent, he might be met by the answer that the tenancy had been determined by acts of the tenant of which he then first heard. It is unnecessary on our construction of the statute to show that there was evidence of the creation of a new tenancy at will; but if there was such a new tenancy created, then, clearly, the statute ran only from the new tenancy, as was held in *Randall v. Stevens*, and *Locke v. Matheus*. And there was evidence in the present case of the creation of a new tenancy at will. A tenancy at will exists wherever, without other title, land is occupied with a concurrence of will of occupier and owner: Watkins on Conveyancing, Bk. I. ch. 1. It is a general principle that the law will not, where it need not, attribute tenancy of land to a trespass.

A reply was not called for.

The following authorities, in addition to those cited in the argument, were also before the Judicial Committee, being referred to in the judgments delivered in the Court below:—*Pinhorn v. Souster*, 1 W. R. 336, 8 Ex. 763; *Doe v. Groves*, 10 Q. B. 486; *Doe v. Coombes*, 9 C. B. 714; *Tayleur v. Wildin*, 16 W. R. 1018; *Moss v. Gallimore*, 1 Sm. L. C. 543; *Doe v. Thomas*, 6 Ex. 851; *Melling v. Leak*, 3 W. R. 595, 16 C. B. 652; *Shelford's Real Prop. Stat.* pp. 165—172; *Wallis v. Delmar*, 29 L. J. Ex. 276.

July 20.—The decision of the Judicial Committee was delivered by

SIR JOSEPH NAPIER.—The appeal in this case has been brought against an order pronounced on the 1st September, 1869, in the Supreme Court of New South Wales, by which it was ordered that the verdict found for the plaintiff herein be set aside and a new trial had between the parties. The action was one of ejectment, in which the plaintiff sought to recover a plot or parcel of ground in the city of Sydney, which had formerly belonged to the late Thomas Day the elder. His residence, and the premises on which he carried on his business as a boat builder, were situate on this property. In the month of May, 1842, he gave over the business and his property to his eldest son (the late Thomas Day the younger), then of age, and went to reside at a place called Pyrmont with his family. He had other property in addition to that which he gave over to his son. Thomas Day the younger, having thus been put in possession, as ostensible owner of this property, and manager of the business of boat builder, continued in the occupation from the month of May, 1842, down to the time of his death in December, 1864. He made his will and devised the property in dispute to his

wife for life; she was the plaintiff in the ejectment. The defendants claim under the will of Thomas Day the elder, who, in 1867, procured attornments from the tenants on the property, to whom Thomas, the son, had let portions.

The trial of the ejectment took place before Chief Justice Stephen and a jury, in November, 1868. Evidence was given to prove the circumstances under which Thomas Day the elder gave up the property to his son Thomas, and put him in possession in 1842; to show the character of his occupation, and what he did in building on the property and letting to tenants; and that these acts and dealings were known to Thomas Day the elder and had his sanction. He did not execute any deed of conveyance to his son, and consequently it was admitted on both sides that the estate of the latter at the commencement was, in law, a tenancy at will.

The occupation of Thomas Day (the son) having been shown to have continued without interruption for twenty-two years, after the commencement of the estate at will in May, 1842, it was submitted at the trial on the part of the defendants that as it appeared on the evidence that at various dates commencing in or about 1852, Thomas Day (the son) let portions of the property in dispute on yearly and weekly terms, and received rent for the same, and transferred or purported to transfer part of the land to his brother William, who let and received rent for the same, of which letting and transfer Thomas Day (the father) had notice, at the times at which they took place respectively; and as the portion of the land sought to be recovered continued to be to the knowledge and with the sanction of Thomas Day the elder, in the occupation of Thomas Day the younger, or of tenants paying rent to him until his death in 1864—"these facts amounted to a termination of the original tenancy at will created in May, 1842, and to the creation of a fresh tenancy, so that the Statute of Limitations began to run in favor of Thomas Day, the son, only from such determination."

A non-suit was called for, but this was refused by the Chief Justice, who, upon the close of the evidence on both sides, submitted to the jury certain questions in writing, accompanied by an explanatory charge.

In answer to these questions the jury found that the authority given by the father to the son to occupy the property was not upon condition, but in perpetuity in his own right; that the acts of letting and transferring of portions of the property by his son were not in violation of the authority given by the father; that these acts were done with his knowledge and assent, and that no fresh authority was afterwards given.

The jury having returned these answers, were directed by the Chief Justice to find a verdict for the plaintiff, which they found accordingly.

A rule nisi was obtained to have the verdict set aside and a new trial granted. This rule was afterwards made absolute, the Chief Justice dissenting. The majority of the Court held that the jury were misdirected as to the question whether the original tenancy at will was determined by the underletting. One of the two judges who constituted the majority, thought that the jury were not sufficiently instructed

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as to implying a new tenancy at will from the acts and conduct of the parties, without finding an actual agreement. The other judge was of opinion that the verdict was against evidence. He does not state whether this applied to all the answers of the jury or to which in particular.

The material question in this appeal is, whether the occupation of the late Thomas Day the younger, from May, 1842, until December, 1864, was such as to have conferred on him an indefeasible title to the property, so that it passed by his will to his widow and devisee. His occupation at the commencement was that of a tenant at will. His father must be taken to have been the legal owner and proprietor, subject to the tenancy at will. If before and at the time of the death of the son, the father's right of entry, or of bringing an action to recover this property, was barred, the son died seised, and the plaintiff's title is good.

This depends on the construction and effect of the Statute of Limitations (8 & 4 Will. 4, c. 27).

The second section of the statute enacts, that no person shall make an entry on any land or bring an action to recover it, except within twenty years next after the right to make that entry or to bring that action shall have first accrued to him.

A right of entry may be said to exist at all times in him, under whom, and at whose will the occupier holds, for he may enter at any time, and determine his will.

But the 7th section enacts, that the right of the person entitled, subject to a tenancy at will, to make an entry or to bring an action to recover the land shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined.

The reasonable construction of this provision is (according to Lord St. Leonards) that the right shall accrue ultimately at the end of a year from the commencement of the tenancy at will, though it may accrue sooner by the actual determination of the tenancy.

In the present case, the right under the statute must be deemed to have first accrued to Thomas Day, the father, in May, 1843, at which time the tenancy at will under which the occupation began, must, for the purposes of the bar of the statute, be deemed to have determined. The condition of Thomas Day, the son, was, for these purposes, but that of a tenant at sufferance, from and after May, 1843, unless and until a subsequent tenancy at will was created by a fresh agreement of the parties.

The defendants submitted that there was a determination of the original tenancy within twenty years before the end of the period of limitation. The acts on which they relied in order to show that the original tenancy was so determined, were consistent with the character of the occupation confided to Thomas, the son, and were beneficial to the property. It seems difficult to conclude that acts which were conformable (not contrary) to his father's will, which had his sanction, and so far were authorized, not wrongful, should have determined the tenancy at will. It might be more reasonable to regard them as acts of a like character, done

by a mortgagor or *cestui que trust* in possession are regarded—that is to say, as impliedly authorized by the character in which, and the circumstances under which, he occupies at will.

It seems to their Lordships, that as in this case the statute began to run from May, 1843, the question of a subsequent determination of the original tenancy, is only relevant so far as it may have been preliminary to the creation of a fresh tenancy at will after the determination of the first, and within the period of limitation. In any other view, such a determination of the original tenancy after the end of the first year is *per se* irrelevant. When there is an alternative given by the statute sufficient to set it running, it would be inconsistent with its purpose to allow the running to be stopped by the happening of that which, if time had not been running, would in itself have set it running. The actual subsequent determination of the tenancy could only have the effect of making the tenant, for all purposes, what he was already, from the end of the first year, for the purposes of the bar of the statute—a tenant at sufferance.

Their Lordships, therefore, are of opinion that the defence made at the trial, as stated in the 11th paragraph of the respondent's case, cannot be maintained. It submits "that the statute began to run in favor of Thomas Day, Jun., only from such determination," i. e., the alleged determination by the acts stated in the 8th, 9th, and 10th paragraphs. They are clearly of opinion that the statute began to run in favor of Thomas Day, the son, in May, 1843, at the end of the first year of his tenancy, and that a subsequent determination of that tenancy could not of itself be sufficient to stop the running of the statutory bar.

When the statute has once begun to run, it would seem on principle that it could not cease to run unless the real owner, whom the statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored either by entering on the actual occupation of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person, which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at will.

It was contended that there was not only a determination of the original tenancy at will, but the creation of a fresh tenancy, inasmuch as after such alleged determination, "the portion of the land sought to be recovered continued to be, to the knowledge and with the sanction of Thomas Day, Sen., in the occupation of Thomas Day, Jun., or of tenants paying rent to him, until his death in December, 1864."

The Chief Justice put the question in writing to the jury whether, with the knowledge of the acts done by Thomas, the son, a new authority to occupy was given by Thomas, the father, and this was answered in the negative; and afterwards, he put orally a question to the jury, whether a new tenancy at will was created by a new authority to occupy, then given, or fresh arrangement made between the parties. This was also answered in the negative by the jury.

Their Lordships cannot concur in the opinion of Mr. Justice Cheeke, if he meant to say that both or either of these answers was contrary to

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the evidence; nor can they concur in the opinion of Mr. Justice Hargrave, that the jury may have been misled by not having been sufficiently instructed as to their power to imply a new tenancy at will from the acts and conduct of the parties, without finding an actual agreement.

Assuming that there was a determination of the tenancy, and that the occupation of Thomas Day, the son, continued without interruption, to the knowledge and with the sanction of Thomas Day, the elder, this would constitute an occupation at sufferance to all intents, and so far as related to the purposes of the statutory bar, no alteration would be made in the status of Thomas, the son. The right of entry created by the 7th section of the statute was not thereby waived, suspended or extinguished; there was no reversion of possession: the running of the statute was in nowise impeded. Doubtless, an agreement for a fresh tenancy may be implied from acts and conduct, if such are proved as ought to satisfy a jury that the parties actually made such an agreement; and in that event it is proper to be found by a jury as a material fact in issue. No such evidence has been given in this case.

The express exception in favour of cases within the 14th section of the Act, where there has been a written acknowledgement of the title, shows the pervading purpose of the Legislature in creating the bar under the previous sections. Besides, as stated by Sir W. Erie, C.J., in *Locke v. Matthews*, 11 W. R. 343, 13 C. B. N. S. 864, "If the owner enters effectively and creates a new tenancy at will, he has twenty-one years from that period before he can forfeit his estate." The language and policy of the statute require that to constitute this new *terminus a quo*, the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, and with an intention to create a fresh tenancy at will.

The question in effect is, whether the prescribed period has elapsed since the right accrued to make an entry or bring an action to recover the property, where such entry or action might have, but has not, been made or brought within such period. It seems to their Lordships that in this case the prescribed period of limitation elapsed at the end of twenty-one years from the commencement of the tenancy at will; that whether this tenancy was determined by the acts of the parties is not material, inasmuch as there was not a fresh tenancy at will created within this period. They think that the findings of the jury were according to the evidence, and that there was not any misdirection on the part of the Chief Justice, by which the jury could be supposed to have been misled. It is not necessary for their Lordships to review in detail, or further to express an opinion on the positions of law in the elaborate and able judgment of the learned Chief Justice. It is enough to say that, in the opinion of their Lordships, there was not any misdirection upon any material point; that the findings of the jury were warranted by the evidence, and that the verdict for the plaintiff is a right verdict, and ought not to be set aside.

They will, therefore, humbly recommend her Majesty that this appeal be allowed; that the order of the Supreme Court of New South Wales,

by which the verdict was ordered to be set aside and a new trial had, be annulled; the rule nisi be discharged with costs; and the postea delivered to the plaintiff to enter judgment on the verdict.

The appellants to have the costs of this appeal.

EXCHEQUER.

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Contract for personal services—Excuse of non-performance—Act of God.

In contracts to render services purely personal there is implied a condition that the parties shall be exonerated from the contract if performance thereof is prevented by inability resulting from the act of God. The plaintiff engaged the defendant's wife to play the piano at a concert he was about to give; meanwhile she fell ill, and consequently the concert did not take place. The plaintiff then brought this action to recover his expenses and loss of profits from the defendants, on behalf of whom the wife had made the contract.

Held, that the contract was conditional on the lady being in a fit state of health to play, and that there had not been any breach of contract on the part of the defendant.

Quære, whether the plaintiff was entitled to notice of the lady's inability to perform the contract.

[19 W. R. 1036, Exch.]

Declaration—that in consideration of twenty guineas to be paid by the plaintiff to the defendant, the defendant promised that his wife should perform at a musical entertainment to be given by the plaintiff, but that she did not perform, whereby the plaintiff was unable to give the entertainment, and lost the profits that he would have made, and incurred expenses in taking a room and circulating advertisements.

The question in the case arose on the 9th plea, which averred that the promise made by the defendant was subject to a certain term and condition—namely, that if his wife should be unable to perform at the entertainment in consequence of illness, the defendant should be exonerated and discharged from fulfilling his promise, and that she was unable to perform at the entertainment in consequence of illness.

The action was tried before Brett, J., at the Lincolnshire Spring Assizes, when it appeared that the defendant's wife was Madame Arabella Goddard, the well known pianist; and that on the 17th of December, 1869, she agreed with the plaintiff, a music master at Gainsborough, to play at a concert to be given by him at Brigg, in Lincolnshire, on the 14th of January, 1870; nothing was said about what was to be done in case of her illness. Madame Goddard had been ill for some days before the 13th of January, and about one o'clock on that day her doctor told her that she would not be well enough to go into Lincolnshire next day, and it was ultimately admitted by the plaintiff that she was, in fact, prevented by illness from fulfilling her engagement.

When Madame Goddard found that she was too ill to go, she wrote to tell the plaintiff; her letter was delivered to him about nine o'clock on the morning of the 14th, and he thereupon put off the concert and returned the money he had taken.

His claim in this action was for £70. of which £30 was for the expense of hiring a room, advertising, &c., and £40 the profit he reckoned

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he would have cleared if the concert had taken place.

It was admitted that Madame Goddard had contracted as agent for her husband, the defendant.

The learned judge directed the jury that "when a professional person like Madame Goddard enters into an engagement, it is part of the contract that if she is so ill as to make it unreasonable and practically impossible that she should perform her engagement, she is not obliged to do it; and if under those circumstances she does not do it, she is not liable to an action for not having done it. But at the same time if a person in her position is disabled by illness, or is so ill as to be unable to keep her engagement, she is bound within a reasonable time after she knows that she cannot from illness keep her engagement, to inform the person with whom she has contracted of that fact." A count for not giving such reasonable notice was added at the trial, and it having been proved that the plaintiff had spent £2 13s. 9d. for telegrams and mounted messengers to prevent people coming from the country to the concert, which would not have been necessary if Madame Goddard had notified her illness by telegram instead of letter, the jury found on the only question left to them, that she had not given reasonable notice, and gave a verdict for £2 13s. 9d. on the added count.

The plaintiff having obtained a rule *nisi* for a new trial on the ground (amongst others) that the learned judge had misdirected the jury in telling them, as above stated, that the contract was impliedly conditional.

O'Brien, Serjt, and Wills, showed cause.—The contract that the defendant's wife should perform at the concert was conditional on her not being incapacitated by illness; such a condition is implied in all contracts of this kind. This point was much discussed in *Hill v. Wright*, 8 W. R. 160, E. B. & E. 746, where to an action for breach of promise of marriage, the defendant pleaded that after the promise and before breach thereof, he fell into such a state of health that he became incapable of marriage without great danger of his life; the Court of Queen's Bench was equally divided on the question of the validity of this plea; and though the Court of Exchequer Chamber held that it did not afford any defence to that action, yet the tenor of the judgments delivered shows that such a plea is a good defence to this action. And in *Taylor v. Caldwell*, 11 W. R. 726, 3 B. & S. 826, it was held to be an established principle, that, if the nature of a contract shows that the parties must all along have known that it could not be fulfilled unless some particular thing continued to exist, such a contract is not to be construed as a positive contract, but as impliedly subject to a condition that a breach shall be excused, in case before breach performance becomes impossible from the perishing of the thing without default of the contractor, and although this principle was somewhat qualified by the decision of the Court of Common Pleas in *Appleby v. Meyers*, 14 W. R. 835, L. R. 1 C. P. 616, that decision was reversed in the Exchequer Chamber, 15 W. R. 128, L. R. 2 C. P. 661. Now in the present case the contracting parties have assumed the continuing existence of Madame Goddard's health, and as that failed, the contract came to an end.

D. Seymour, Q.C., and Cave, in support of the rule.—Sickness is no excuse for non-performance of a contract of this kind. The cases go to show that nothing short of death affords such an excuse, and strictly speaking, the death of a party to a contract for personal services operates as a dissolution of the contract, and not as an excuse for its non-performance; the law is clearly so laid down in the case of *Stubbs v. The Holywell Railway Company*, 15 W. R. 869, L. R. 2 Ex. 311, and *Farrow v. Wilson*, 18 W. R. 42, L. R. 4 C. P. 745,* is to the same effect. When a party enters into an absolute and unqualified contract to do some particular act, the impossibility of performing it, occasioned by some inevitable accident or unforeseen cause, is no answer to an action for damages for breach of contract: *Kearon v. Pearson*, 10 W. R. 12, 7 H. & N. 386; *Barker v. Hodgson*, 8 M. & S. 267. But these and other cases to the same effect refer back to and are grounded upon *Paradine v. Jane*, Aleyn, 27, in which case the material resolution of the Court was that "where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, then law will excuse him, but when the party by his own contract creates a duty or charge upon himself he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." That is adopted in *Clifford v. Watts*, 18 W. R. 925, L. R. 5 C. P. 577, which is the last case bearing upon the question. It is there laid down by Willes, J., in the course of his judgment that "where a thing becomes impossible of performance by the act of a third party, or even by the act of God, its impossibility affords no excuse for its non-performance; it is the defendant's own folly that has led him to make such a bargain without providing against the possible contingency." This case falls within the precise terms of *Hill v. Wright*, (*ubi supra*); putting it in the way most favourable to the defendant, Madame Goddard could not have fulfilled her engagement without endangering her life; it was prudent of her to stay away, but for so doing she must pay damages.

KELLY, C.B.—This case no doubt raises a highly important question. It appears that it was agreed that in consideration of a sum certain, the defendant's wife should be present on the 14th of January at Brigg, in Lincolnshire, to play the piano at a concert, of which the proceeds were to belong to the plaintiff; she was prevented by illness from fulfilling her engagement, the consequence of which was that the concert did not take place, and in answer to an alleged breach of the contract, it is pleaded that it was a condition of the contract that the defendant should be exonerated therefrom if his wife was prevented by illness from performing it, and that such, in fact, was the cause of her not performing it, and the question is, whether that is a lawful and sufficient defence. In my opinion it is. The contract is not merely for personal services, but it is one that could not have been performed by any other person, and the law applicable to such a case is laid down most clearly and accurately by Pollock, C.B., in

* For report of this case see 6 U.C.L.J.N.S. 17.—Eds. L.J.

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Hall v. Wright, 8 W. R. 160, E. B. & E. 746, in these terms, "It must be conceded on all hands that there are contracts to which the law implies exceptions and conditions which are not expressed. . . . A contract by an author to write a book within a reasonable time, or by a painter to paint a picture within a reasonable time, would, in my judgment, be subject to the condition that, if the author became insane or the painter paralytic and so incapable of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be liable if he had been removed by death." The law thus stated clearly applies to this case, which is that of an artiste who having contracted to play is prevented from so doing by illness, and it follows that in such a case the non-performance of the contract is excused. And the passage cited in the course of the argument from the judgment of the Court of Queen's Bench in *Taylor v. Caldwell*, 11 W. R. 726, 3 B. & S. 826, when construed with reference to the illness of a player on the pianoforte, is a strong authority in favour of the construction put upon this contract by the defendant. Indeed *Boast v. Firth*, 17 W. R. 29, L. R. 4 C. P. 1, and other cases all go to establish that non-performance of a contract for personal services is excused, if it is owing to a disability caused by the act of God or of the other contracting party. Some question has been raised as to the degree of illness which will excuse the performance of a contract of this kind, but if the party is unable to carry out the contract according to the real intention of the parties, that inability is an excuse for non-performance.

Then comes a further question: the plaintiff contends that if non-performance of the contract was excused by Madame Goddard's illness, he was entitled to have notice of it in sufficient time; I do not enter into the question of whether notice was necessary in this case; if the lady had been attacked by illness three or four weeks before the time when the performance was to take place, I do not say that she would not have had to give notice. But assuming that it was proper to leave to the jury the evidence as to the amount of damages resulting from insufficient notice, I think they found a very proper verdict. My brother Channell acquiesces in this, but does not express any opinion as to whether there was any legal liability to give notice of the illness.

BRAMWELL, B.—Following the example of my brother Channell, I will not say whether it was necessary for the defendant to give the notice, the want of which is complained of.

Mr. Cave seemed disposed to contend that it was not necessary for the plaintiff to amend, because the defendant was relying on a conditional condition which could not be of any avail to him, inasmuch as he had not sent the notice which was a condition precedent to his being entitled to claim exoneration from his contract by reason of his wife's illness. I do not agree with the argument; to give notice may have been the defendant's duty, but it was not a condition, non-performance of which would prevent the wife's illness from excusing the fulfilment of the original contract. If the plaintiff had replied that the condition pleaded by the defendant was itself subject to a condition which

had not been performed, that would have been a departure.

I take it as admitted that the lady was practically not in a condition to play; she could not have played efficiently, and it would have been dangerous to her life to play at all—is it or is it not a condition of the contract that the lady, being in such a state, shall play? I will go further, is it not a condition that she shall not play? Could it be said that she was entitled to go down to Lincolnshire, and get her fee for playing in such a way as to disgust her audience?

It has been argued that to allow inability arising from illness to be an excuse for non-performance of this contract, is to engraft an implied on an express contract, but this is a fallacy, though such a consideration appears to have had weight in the minds of some of the learned judges who decided *Hall v. Wright* (*ubi supra*), of which case I entertain with unabated strength, the opinion I there expressed. The fallacy is in taking the original contract to be absolute and unqualified, and the new term to be a superadded condition, whereas the whole question is, what was the original contract, was it absolute or conditional? Of course there might be an agreement to play and not to die or be ill, and for breaking such an agreement, the defendant would have to pay in damages, but no such term formed part of the contract between the parties to this action, and in my judgment the contract between them must be taken to have been subject to the condition pleaded by the defendant. Were we to hold otherwise, we should arrive at the preposterous result that though the lady might have been so ill as to be scarcely able to finger the instrument, she would have been entitled to play and pay.

CLEARY, B.—I do not intend to express any opinion on the question of the necessity of notice.

The contract in this case was that the lady should play the piano, to do which well demands, as we all know, the greatest skill and most exquisite taste; if it is not well done, it is better left undone. Now, if the performance of such a contract is prevented by the act of God, as by a sudden seizure or illness, the parties are exonerated from the contract, for it is wholly based on the assumption that the musician will live, and will be in health at the time when the contract is to be carried out; that is an assumption made by both the parties to the contract, both are responsible for the imprudence and folly, if any, of making that assumption, but as it is the foundation of the contract, if that assumption fails the whole contract is at an end. The case of *Boast v. Firth*, was decided on the same principle, which is extremely well expressed by Brett, J., in these terms—"This contract is for personal services, and both parties must have known and contemplated at the time of entering into it that the performance of the services was dependent on the servant's continuing in a condition of health to make it possible for him to render them, and if a disability arises from the act of God, the non-performance of the contract is excused." I agree that that is the law and in my judgment, it is decisive in this case.

*Rule discharged.**

* Leave to appeal was refused.

Eng. Rep.]

NEWELL V. NEWELL.—PEARSON V. PEARSON AND PEARSON.

[Eng. Rep.]

CHANCERY.

NEWELL V. NEWELL.

Will—Construction—Gift of property "for benefit of wife and children."

A testator devised and bequeathed all his property to his wife, for the use and benefit of herself and of all his children.

Held, that it was a gift to the wife for life, with remainder to the children.

[19 W. R. 1001, V. C. M.]

This was an administration suit. The testator by his will, dated the 19th of October, 1868, devised and bequeathed unto his wife, Anna Elizabeth Newell, for the use and benefit of herself and all his children, whether born of his former wife, or such as might be born of her, Anna Elizabeth Newell, all his property of every description, real and personal, whether in possession, reversion, remainder, or expectancy, at the time of his decease.

The testator was twice married, and left eight children surviving him, six by the first marriage, and two by the second. He had no real estate, but died possessed of considerable personal estate.

The only children living at the date of the will were those by the first wife.

The suit now came on to be heard on further consideration, and the question was whether the widow and children took as joint tenants, or whether the widow took a life estate, with remainder to the children.

Pearson, Q. C., and *Holmes*, for the plaintiffs, the children of the first marriage, contended that the will created a joint tenancy between the widow and children. They cited *De Witte v. De Witte*, 11 Sim. 41; *Bustard v. Saunders*, 7 Beav. 92; *Bibby v. Thompson*, 82 Beav. 646

Marcy, for the guardian of some of the children, who were infants, supported the same view.

Glass, Q. C., and *Rogers*, for the widow, contended that it was a gift for life, with remainder to the children. They cited *Armstrong v. Armstrong*, 17 W. R. 570, L. R. 7 Eq 518; *Audsley v. Horn*, 7 W. R. 125, 26 Beav. 196; *Re Owen's Trusts*, before Vice-Chancellor Wickens on the 26th of May (not reported); *Ward v. Grey*, 7 W. R. 569, 26 Beav. 485; *Crockett v. Crockett*, 2 Ph. 553; *Lambe v. Eames*, 18 W. R., 972, L. R. 10 Eq. 267; * *Jeffery v. De Vitre*, 24 Beav. 296.

Pearson, Q. C., in reply, referred to *Mason v. Clarke*, 1 W. R. 297.

MALINS, V. C., said this was a mere question of the intention of the testator. It was quite clear he meant his property to go to his wife for the benefit of herself and his children, whether she and they took as joint-tenants, or whether she took a life estate with remainder to the children, but it would make a material difference to her which way it went. If he were to look at this will apart from the authorities, what was the testator's intention? What were the probabilities? What must he have meant? Considering it was his main duty to take care of his wife, he should conclude that it was his intention that she should have it all for her life—upon intention only that was the decision he should arrive at. Was he prevented from so deciding by the authorities, which were very contrary? The

current of authorities latterly had run in a direction opposite to what it did formerly, and it ran in a way which coincided with his opinion, that when a man gave property by will for the benefit of his wife and children he meant it to be for his wife for life with remainder for the children. There would be a declaration in accordance with that view.

PROBATE.

PEARSON V. PEARSON AND PEARSON.

Will—Execution—Signature of testator unseen by witnesses—Insufficient acknowledgment.

The testator asked two persons, who were both unable to read or write, to "make their marks to a paper," and they did so. This paper was the testator's will, but he made no statement whatever as to the nature of its contents to the witnesses. The witnesses were unable to say whether or not the testator's signature was affixed previous to the attestation, and there was no evidence on this point.

Held, an undue execution.

Previous cases reviewed.

[19 W. R. 1014.—P. & M.]

George Pearson, gardener, late of Hockwold-cum-Wilton, in the county of Norfolk, died on the 31st of March, 1870; he left a will bearing date the 9th of October, 1865.

The will was entirely in the handwriting of the testator, and was signed by him. There was no attestation clause, but the will had been witnessed by a man and his wife, who, being unable to write, had subscribed their marks. Opposite to each of their marks was the name of the witness, and the word "witness" written in the handwriting of the deceased. The remainder of the facts are sufficiently stated in the judgment.

The plaintiff, as heir-at-law, propounded the will, and the defendants pleaded that it was not executed in accordance with the provisions of the Wills Act, 1 Vic. ch. 26.

Dr. Tristram, for the plaintiff, cited *In the Goods of Thomson*, 4 Notes of Cases, 648; *Cooper v. Bocket*, 4 Moo. P. C. C. 419.

G. Browne, for the defendants.

Cur. adv. vult.

May 18.—*LORD PENZANCE*.—The question in this case was, whether the testator's will was duly executed. The following is the evidence of the two attesting witnesses; Henry Whistler said, "The testator asked me to make my mark to this paper. I did so, and he then asked me if my wife was in. I said 'Yes.' He then told me to call her. I did so, and the testator told her to make her mark to the paper. She did so." Whistler's wife said "I was called in by my husband, and made my mark. My husband had made his mark before I was called. I did not see him make any mark." The witnesses were examined at some length with reference to the question whether they were both present at the same time, and it was contended that the wife should be supposed to have been present, because she was in the passage, and might have seen her husband affix his mark to the will. My judgment, however, does not depend upon that question, but I must say that, if it were necessary that it should be decided, I should decide against the witnesses having been present together.

Eng. Rep.]

PEARSON V. PEARSON AND PEARSON.

[Eng. Rep.]

The question seems to me to be whether assuming both witnesses to have been present at the time, what took place amounted to a due acknowledgment of his signature by the testator. Nothing was said by the testator to the witnesses, before they were asked by him to make their marks; they were not told by him that the paper was his will, nor was anything said as to its contents; neither is there any proof that the testator's name was on the paper, when the witnesses added their marks. The witnesses are illiterate people, unable to read or write, and therefore they cannot swear as to whether the testator had or had not signed before they attested. The Court took time to consider the question which was raised upon these facts, on account of a case cited in argument by Dr. Tristram, namely, that of *In the Goods of Thompson* (4 Notes of Cases, 643). There are some remarkable expressions in the judgment in that case, which seemed to render it advisable that I should review the decisions on this point.

The authority which has guided the court in questions of this kind, is *Gwillim v. Gwillim*, 3 Sw. & Tr. 200. Sir Cresswell Cresswell decided in that case, that, where at the time of the execution, the witnesses had been told that the paper they were attesting was the testator's will, and where, from the surrounding circumstances of the case, the court can arrive at an affirmative conclusion, that the testator's signature had been affixed before the attestation, there is then a sufficient acknowledgment by the testator. Such, I think, is in substance the decision in *Gwillim v. Gwillim*; and that decision has been followed by the court, in the subsequent cases of *In the Goods of Huckvale*, L. R. 1 P. & M. 375, and *Beckett v. Howe*, L. R. 2 P. & M. 1, 18 W. R. 75. In the former of these cases the court said—"The result is, that where there is no direct evidence one way or the other, but a paper is produced to the witnesses, and they are asked to witness it as a will, the court may, independently of any positive evidence, investigate the circumstances of the case, and may form its own opinion from these circumstances, and from the appearance of the document itself, as to whether the name of the testator was or was not upon it at the time of the attestation; and if it arrives at the conclusion that it was there at the time, the case falls within the principles of the decisions to which I have referred, and the execution is good. * * * I may add that there is a class of cases, the circumstances of which are such as to exceed the limits of the rule laid down in *Gwillim v. Gwillim*. One of those cases is *In the Goods of Hammond*, 11 W. R. 639, 8 Sw. & Tr. 94, in which Sir Cresswell Cresswell decided that where there was no evidence at all on the question, whether anything had been written before the signature of the testator, the court could make no presumption. To the same effect is *In the Goods of Pearsons*, 38 L. J. P. M. & A. 177. In both these cases the witnesses saw nothing but a blank piece of paper, and did not know anything about the nature of the instrument they were asked to attest. The circumstances of these cases seem beyond the limit to which the doctrine laid down in *Gwillim v. Gwillim*, ought to be carried." In the other case—*Beckett v. Howe*—the court said—"The

sum and substance is, that the witnesses did not see the testator's signature, nor did the testator say it was there, but he did tell one witness that he was going to execute a will, and indirectly to both he expressed that intention, for he told them that some alteration was necessary in his affairs, by reason of his wife's death. The doctrine in *Gwillim v. Gwillim* is this, that if the testator produces a paper, and gives the witnesses to understand it is his will, and gets them to sign their names, that amounts to an acknowledgment of his signature, if the court is satisfied that the signature of the testator was on the will at the time. Whether that decision was right or wrong I have not to determine. It was founded on other cases. Provided the testator acknowledges the paper to be his will, and his signature is there at the time, it is sufficient." That is the manner in which the court has hitherto dealt with questions of this kind, but in the case of *In the Goods of Thompson*, I find the following expressions in the judgment of Sir Herbert Jenner Fust:—"It is clear that the codicil was not signed by the testator in the presence of both the witnesses whose names are subscribed to it, and there was no express acknowledgment of his signature by him in their presence; the question is, whether, according to the construction of the statute, there was a sufficient acknowledgment in the presence of the two attesting witnesses. Now the court has been obliged in many cases to put a construction upon the clause of the statute respecting the execution of wills, and it has held that an express acknowledgment is not necessary; that when a paper is produced by a testator to witnesses with his name signed thereto, and they have an opportunity of seeing his name, and they attest the same by subscribing the paper, they being present at the same time, this is a sufficient acknowledgment of his signature by the testator, though the signature was not actually made in their presence or expressly acknowledged." Now if that doctrine be correct, and its terms should be adhered to, it undoubtedly goes beyond the other cases to which I have referred, because it only requires for a sufficient acknowledgment, that the name of the testator should be upon the paper at the time of the attestation, and that the witnesses should merely be asked to sign their names without any statement by the testator that the paper was his will, or of what nature it might be. It was that case which induced me to review the decisions on the point; in so doing one of the decisions I came upon was that in *Nott v. Genge*, 3 Curt. 160, which was delivered by Sir Herbert Jenner Fust in the Prerogative Court of Canterbury. The learned judge said: "Under the present statute, the testator must acknowledge his signature, not his will merely, and there is no proof in this case to satisfy my mind that the will was signed before it was produced to the witnesses. It is not sufficient, in my opinion, merely to produce the paper to the witnesses, when it does not appear that the signature of the testator was affixed to it at the time, and this it is which distinguishes this case from those under the Statute of Frauds, as in all those cases, with the exception, perhaps, of *Peate v. Ogley*, Com. 196, the will was proved to have been signed

U. S. Rep.]

ANNA ECKERT, ADM., &C. v. THE LONG ISLAND R. R. Co.

[U. S. Rep.]

before it was produced to the witnesses." That case went on appeal before the Privy Council, 4 Moo. P. C. C. 265. The judgment given is one of a court deserving the highest possible consideration, for it was composed of the Lord Chancellor (Lord Lyndhurst), Lord Brougham, Lord Denman, Lord Abinger, Lord Campbell, Mr. Baron Parke, the Vice-Chancellor Knight-Bruce, and Dr. Lushington. As the judgment is short, I will read it in its entirety: "In this case we do not think it necessary to decide the question as to whether or not the instrument was signed before the witnesses were called in; but, assuming that it was signed by deceased before the witnesses were called in, we are of opinion that the mere circumstance of calling in witnesses to sign, without giving them any explanation of the instrument they are signing, does not amount to an acknowledgment of the signature by a testator. We are all of opinion that the instrument was not signed in the presence of the witnesses. The cases which have been referred to under the old law, we think do not apply. We affirm the sentence of the court below, and give costs, both here and below, out of the estate." That decision seems to set at rest any doubts which might have arisen in consequence of the judgment in the case of *In the Goods of Thompson*; it was the decision of a court of appeal in 1844, and this court is bound by it.

In the present case there was no evidence whatever as to whether the signature of the testator was on the paper at the time of the attestation, and even had it been there, the fact that the witnesses were merely called in to make their marks without any explanation being given of the nature of the document, is sufficient, according to the judgment of the Privy Council in *Holt v. Genge*, to show that there was not a due acknowledgment of his signature by the testator.

I must, therefore, hold that the will was not duly executed.

UNITED STATES REPORTS.

COURT OF APPEALS, NEW YORK.

ANNA ECKERT, ADMINISTRATRIX, &C., v. THE LONG ISLAND R. R. Co.

What would be negligence for the purpose of saving property would not be for the purpose of saving human life.

1. Held, that a person voluntarily placing himself, for the protection of property merely, in a position of danger, is negligent, so as to preclude his recovery for any injury so received, but that it is otherwise when such an exposure is for the purpose of saving human life, and it is for the jury to say in such cases whether the conduct of the party injured is to be deemed rash and reckless.
2. The plaintiff's intestate seeing a small child on the track of the defendants' railroad, and a train swiftly approaching, so that the child would be almost instantly crushed, unless an immediate effort was made to save it, and in the sudden exigency of the occasion, wishing to save the child, and succeeding, lost his own life by being run over by the train.

Held that his voluntarily exposing himself to the danger for the purpose of saving the child's life was not, as a matter of law, negligence on his part, precluding a recovery.

[Chicago Legal News, Sept. 9th, 1871.]

Appeal from the judgment of the late general term of the Supreme Court, in the second judi-

cial district, affirming a judgment for the plaintiff in the city court of Brooklyn, upon a verdict of a jury. Action in the city court of Brooklyn, by the plaintiff, as administratrix of her husband, Henry Eckert, deceased, to recover damages for the death of the intestate, caused as alleged by the negligence of the defendants, their servants and agents, in the conduct and running of a train of cars over their road. The case, as made by the plaintiff, was that the deceased received an injury from a locomotive engine of the defendants, which resulted in his death, on the 26th day of November, 1867, under the following circumstances:

He was standing in the afternoon of the day named, in conversation with another person, about fifty feet from the defendants' track, in East New York, as a train of cars was coming in from Jamaica, at a rate of speed estimated by the plaintiff's witnesses at from twelve to twenty miles per hour. The plaintiff's witnesses heard no signal either from the whistle or the bell upon the engine. The engine was constructed to run either way without turning, and it was then running backward, with the cow-catcher next the train it was drawing, and nothing in front to remove obstacles from the track. The claim of the plaintiff was that the evidence authorized the jury to find that the speed of the train was improper and negligent in that particular place, it being a thickly populated neighborhood, and one of the stations of the road.

The evidence on the part of the plaintiff also showed that a child three or four years old was sitting or standing upon the track of the defendants' road as the train of cars was approaching, and was liable to be run over if not removed, and the deceased, seeing the danger of the child, ran to it, and, seizing it, threw it clear of the track on the side opposite to that from which he came; but continuing across the track himself was struck by the step or some part of the locomotive or tender, thrown down, and received injuries from which he died the same night.

The evidence on the part of the defendant tended to prove that the cars were being run at a very moderate speed, not over seven or eight miles per hour, that the signals required by law were given, and that the child was not on the track over which the cars were passing, but on a side track near the main track.

So far as there was any conflict of evidence or question of fact, the questions were submitted to the jury. At the close of the plaintiff's case, the counsel for the defendants moved for a nonsuit, upon the ground that it appeared that the negligence of the deceased had contributed to the injury, the motion was denied and an exception taken. After the evidence was all in, the judge was requested by the counsel for the defendants to charge the jury, in different forms, that if the deceased voluntarily placed himself in peril from which he received the injury, to save the child, whether the child was or was not in danger, the plaintiff could not recover. All the requests were refused and exceptions taken, and the question whether the negligence of the intestate contributed to the accident was submitted to the jury. The jury found a verdict for the plaintiff,

CORRESPONDENCE.

and judgment entered thereon was affirmed, on appeal, by the Supreme Court, and from the latter judgment the defendant has appealed to this court.

Aaron J. Vanderpoel for appellant.

George G. Reynolds for respondent.

GROVER, J.—The important question in this case arises upon the exception taken by the defendants' counsel to the denial of his motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fall and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was, therefore properly denied. That the jury was warranted in finding the defendant guilty of negligence in running the train in the manner it was running, requires no discussion. None of the exceptions taken to the charge as given, or to the refusals to charge as requested, affect the right of recovery. Upon the principle above stated, the judgment appealed from must be affirmed with costs.

CHURCH, C. J., PECKHAM and RAPALLO, JJ., concurred.

CORRESPONDENCE.

Some recent Division Court Decisions.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—The following cases were decided before Judge Dennistoun in the Division Court at Peterboro':

Defendant had been tenant to plaintiff under a lease under seal. One of his covenants was "to pay, satisfy and discharge all rates, taxes and assessments which shall or may be levied, rated or assessed in or upon the said demised premises during the said demised term." The tenancy commenced on the 20th February, before assessment made, and was to continue for five years. Before the expiry of the term, defendant, becoming embarrassed, requested plaintiff to take the premises off his hands, which he did on the 25th July, after the assessment had been made, taking from defendant a reconveyance under seal, which reconveyance contained this proviso—"Reserving always to plaintiff all his rights and remedies under the said lease and the covenants thereof."

Subsequently to this, plaintiff sued defendant for an account, including a balance of this rent, to which defendant made a set-off of so much of the taxes for that year as accrued after the reconveyance aforesaid, which set-off the learned Judge allowed, holding that as the proviso in the reconveyance did not express the word "taxes," plaintiff could not recover. It will be noted that the proviso expressly reserved to plaintiff all defendant's covenants in the lease, *one of which was to pay these taxes.*

Plaintiff sued defendant for rent due under a lease under seal. Defendant was called to prove the execution of the lease. While plaintiff's examination of defendant was going on, the learned Judge told defendant that he might or might not answer plaintiff's questions, as he pleased. After plaintiff's examination had closed, which was confined to the proving the execution of the lease, defendant volunteered evidence on his own behalf to the effect that the rent ought to be less than that stated in the lease. In vain plaintiff argued that such evidence was not admissible; that defendant could not thus, by his own *parol* evidence, impeach his own solemn deed. Nevertheless the learned Judge held otherwise, and made the reduction accordingly.

CORRESPONDENCE.—REVIEWS.

In *Shannon v. Varsil*, 18 Grant, 10, Spragge, Ch., said: "A. agrees to sell B. certain land for \$1,200. B. could not prove *by parol* that A. agreed subsequently to reduce the purchase-money to \$800." This decision is now, I suppose, overruled by that of Judge Deniston above.

Again: A Municipal Corporation sued an innkeeper for the price of a license to sell spirituous liquors, according to the terms of a By-law made before the passing of the last Municipal Act. The defendant set up that the new Municipal Act had repealed the former By-law, and that, as the Council had not made a new By-law, plaintiffs could not recover, and the learned Judge ruled accordingly. This ruling, however, is in direct opposition to the judgment of the Common Pleas in *Reg. v. Strachan*, 6 U. C. C. P., 191. I suppose this judgment may be considered as now overruled.

Again: The sheriff applied for an interpleader order in the County Court under a *fi. fa.* goods. The parties consented to the trial before the above learned Judge. On the opening of the case the execution creditor called upon the claimant to prove his claim. The claimant objected, and the learned Judge ruled that the execution creditor must shew that the claimant had no title. The effect of this ruling was to place the creditor completely in the claimant's hands, and virtually to put him out of Court. The learned Judge thus decided that the creditor was to prove a negative.

Reports of legal decisions are, or should be, valuable and instructive. Other cases will be furnished you hereafter, this communication being already too long.

A SUITOR.

PETERBORO', September, 1871.

[Without entering into any discussion of these decisions, we certainly do not recommend that they should be followed, assuming, of course, that the report is complete and accurate.—Eds. L. J.]

Evidence Act.

TO THE EDITORS OF THE LAW JOURNAL.

The 2nd section of the 33rd Vic., cap. 18 Ont. provides that defendants can give evidence in cases before Justices of the Peace. Will you

in your next Journal be kind enough to say to what extent they are admissible in their own cases, for instance, breach of by-laws, petty trespass, master and servant, &c.

Yours truly,

NELSON DODGE, J.P.

Milford, 2nd August, 1871.

[This evidence is as admissible as that of a witness other than a party interested would have been before the Evidence Act. The Act applies solely to proceedings in civil cases, evidence in criminal prosecutions not being affected by it.—Eds. L. J.]

REVIEWS.

A GUIDE TO THE LAW OF ELECTIONS. As regulated by 32 Vic. c. 21 and 34 Vic. c. 8. By Charles Allan Brough, Barrister-at-law. Toronto: Henry Rowsell, 1871.

This useful little pamphlet was written at the suggestion of Mr. Vice-Chancellor Mowat, and is dedicated by permission to the judges on the rota for trial of election petitions. It has been very favourably received by them, and by those of the profession who have had occasion to refer to it.

The necessity for some knowledge of the law bearing on contested parliamentary elections came upon the profession here rather suddenly, and naturally found them, in general, unprepared; nor could the necessary books (except a few copies) be obtained here; so that any assistance that could be gained from the sources at command was eagerly sought; and very shortly after this Manual appeared, and though it did not of course pretend a thorough knowledge of the law on the subject, it has proved very useful, in presenting in a compact shape the pith of the leading decisions in England on the analogous enactments, and the opinions of our own judges in the few cases that had come before them at the time it was published.

The Editor, first gives a table shewing the corresponding English and Ontario enactments, which will be of much service when reading the English cases. Before proceeding to discuss the statutes relating to elections, he gives a collection of authorities on the difficult subject of agency as applicable to parliamentary elections, which by the way lead to the irresistible conclusion, that it is much easier for

REVIEWS—ITEMS.

a candidate to appoint an agent, than to prevent all his friends being his agents against his will.

The statutes governing parliamentary elections in this Province are given in full, with appropriate explanatory notes; and we notice with approbation, that wherever he can, the editor has given the language of the judges as found in the reports, instead of merely stating the supposed effect of their decisions; and this, a sensible thing to do in any case, is especially so when the reports are difficult of access to the many.

The Editor, as he explains in his preface, has omitted all preliminary questions connected with the presentation of the petition, confining his attention to those which may arise upon or subsequent to the hearing. This is rather a pity as it would have been convenient to have had as much information as possible under one cover, but we trust that Mr. Brough will do this on a future occasion, when the law is a little better understood, and some doubtful points cleared up, and after any amendments in the law that would seem to be necessary have been made by the legislature. At present an interested reader should, in addition to this pamphlet and the authorities there cited, refer to the rules of court, the report of the Stormont Case published in this Journal, and our remarks on p. 201.

To conclude: though there are a few faults in arrangement and otherwise, we do not care to inspect them too closely, Mr. Brough having done wonders in the few weeks he had at command, and having produced a really useful little book, much wanted at the time, and capable of extension hereafter.

SOME startling statements respecting the *Tichborne* case seem to have reached America. The *Albany Law Journal* commends to our consideration some glaring improprieties: (1) That the jury privately informed the Lord Chief Justice that they were satisfied from the evidence of the claimant himself that he was an impostor; (2) that the jury, having been allowed to return to their homes, have been subjected to influences not calculated to aid in the administration of justice; and (3) that the Chief Justice himself has stated that he expected to see the claimant transferred from the witness box to the dock. The amiability for which our contemporary gives us credit might well be disturbed at discovering such absurd credulity in a reasonable periodical as belief in these rumours indicates. (1.) Before separating, the jury distinctly informed the Judge that they had formed no opinion one way

or the other; (2.) No single complaint has been made of any influence whatever having been used with the jury; and (3.) Whilst we should be sorry to affirm positively that the Chief Justice has not said anything which he may be supposed to have said, we can say that no such expression of expectation as alleged escaped his Lordship in open court. But possibly our contemporary is trying to be witty. We hope not. The purity and impartiality of English justice are our pride and boast, and when we see how much of both is sacrificed in America, we are not likely to lose an atom of what we possess without a struggle. And, in justice to the jury in the *Tichborne* case, we may say that never were men assembled in a jury box more high-minded and able, and less open to the operation of improper influences. We doubt whether an American could understand what an amount of integrity is represented by a Middlesex special jury * * * The American legal journal which we have quoted above, expresses surprise that the public press in England has refrained from commenting upon the *Tichborne* case. It says, "Had the case been on trial in this country, every newspaper from Maine to Georgia would have resolved itself into a tribunal for a summary disposal of it on the merits. The rule that it is a contempt of court for a newspaper to discuss the merits of a case *sub judice*, has so long remained in abeyance among us that the press have come to regard themselves as infallible arbiters in every case, civil or criminal, worthy of their notice. This is an evil that we presume that there is little hope of escaping so long as our judges depend for a renewal of their terms of office on popular suffrage and newspaper influence."—*Law Times*.

1. It is no reason for a new trial in a case of felony that the reasons of the absence of a witness, who should have been present, were investigated while the jurors who were to try the case were in the court room.

2. Where the defence challenges jurors as they are called, and before going into the box, the commonwealth's attorney may reserve his challenges until those of the defence are exhausted.

3. Where two are indicted for procuring an abortion, and one of the defendants just before the trial married the woman on whom it was alleged the abortion had been produced, and then demanded a separate trial, which was granted: *Held*, that the wife was a competent witness against the other defendant.

4. Altho' the general rule is that either the husband or wife is not a competent witness against the other, yet the exceptions are where the witness is called in a collateral case, where the evidence cannot be used in a suit or prosecution against the other, or where there is a separate trial of two defendants for an offence not joint, or where called to testify to personal injuries received from the other.

5. In the second case, the witness has the privilege of declining to answer such questions as will tend to criminate his or her wife or husband. — *Commonwealth v. Reid*. — *United States Reports*.

LAST AMENDMENTS OF THE C. L. P. ACT.

DIARY FOR OCTOBER.

1. SUN. 17th Sunday after Trinity.
2. Mon. Clerks and Deputy-Clerks of Crown and Master and Reg. in Chan. to make quarterly returns.
3. SUN. 18th Sunday after Trinity.
11. Wed. Last day for Reg. & Mas. in Chan. to remit fees.
15. SUN. 19th Sunday after Trinity. Law of England introduced into Upper Canada 1792.
18. Wed. St. Luke the Evangelist.
22. SUN. 20th Sunday after Trinity.
28. Sat. St. Simon and St. Jude.
29. SUN. 21st Sunday after Trinity.
31. Tues. All Hallow Eve.

T H B

Canada Law Journal.

OCTOBER, 1871.

LAST AMENDMENTS OF COMMON LAW PROCEDURE ACT.

The Ontario Statute, 34 Vic. c. 12, has effected some changes in the practice, upon which it is now our object briefly to comment.

The repeal of the sections in the Common Law Procedure Act requiring the order of a Judge to plead several matters, and the extension of the powers of the County Court Judges in certain interlocutory matters in the Superior Courts, have arisen, we suspect, out of the agitation of country practitioners, who desire to reduce their agency fees. No doubt the former practice as to pleading occasioned needless expense in some cases, where no cause could be shown to the allowance of the several matters proposed to be pleaded, or where a consent was given to the granting of an order. We think that the evils intended to be guarded against by the former practice will be sufficiently provided for in section 8 of this Act. Whenever pleas are seen to be embarrassing, or frivolous, or founded upon the same matter, practitioners will always be astute enough to get relief under this provision.

The power conferred upon the county judge of changing the venue in actions in his court, we regard as a most beneficial change in the law. Where the cause of action was transitory, it was competent for a plaintiff to sue the defendant in any County Court; and we have known instances where most vexatious litigation has been instituted by a plaintiff choosing a county remote from the residence of the defendant's witnesses. One of the leading rules now observed by the courts in regulating the place of trial is that, as far as possible, a matter shall be disposed of within the jurisdiction in which it arose: *JAMES, V. C.*, in

Baker v. Wait, L. R. 9 Eq. 105; and, see *Levy v. Rice*, L. R. 5 C. P. 119. Under the old practice, a defendant in the county court had no possible means of relief, unless he could persuade one of the superior court judges to grant him a certiorari, as was done in *Patterson v. Smith*, 14 U. C. C. P. 525.

We incline to doubt whether the Chamber business in Toronto will be much lessened by the extension of the jurisdiction of the county court judges in interlocutory applications. Great confidence is felt in the decisions of the gentleman presiding in Common Law Chambers, and the uniformity of decision secured by coming before the same officer in all such matters, will counterbalance the facility with which such applications can be made in the country before the local Judge. The result will be, perhaps, that all consent applications will be made to the county judge, and all contested motions will be disposed of, as before, at Toronto.

The provision as to obtaining an order to replevy before a county judge, is likewise a benefit, for in many cases expedition is of the essence of the relief. We have known valuable articles to be eligned during the delay occasioned by an application to the Superior Court Judge.

The seventh section of this Act changes the law in actions against officers for an escape. It is a copy *verbatim* of the English Statute, 5 & 6 Vic. c. 98, s. 31. In fact its effect is just to leave the Common Law as it was before the statute 1 Ric. c. 12, which was held to give by construction an action of debt against sheriffs and other officers of like powers, in cases of escape from final process; *Jones v. Pope*, 1 Wms. Saund. 88. The change is a beneficial one, for it does away with the cast-iron rule, that the precise amount of the original judgment shall be recovered against the sheriff, (*Bonafous v. Walker*, 2 L. R. 126), and enables the Court and jury to deal equitably, by proportioning the damages to the value of the custody at the time, and to the wilful misconduct or unwitting error of the officer in charge. As to the mode of estimating the value of the body, and so fixing the damages, refer to *Savage v. Jarvis*, 8 U. C. Q. B. 331; *Kinloch v. Hall*, 25 U. C. Q. B. 141; *Macras v. Clark*, L. R. 1 C. P. 408. And as to the mode of procedure in such cases in a court of equity, see *Moore v. Moore*, 25 Beav. 8.

COURTS OF APPEAL—THE LAW OF DISTRESS.

The 2nd section of the act as to the costs of issues following the finding is a repetition of part of the 110th section of the Common Law Procedure Act, and adds thereto a new provision, allowing the judge who tries the cause to certify against the allowance of such costs. This is perhaps not so much a new provision as a restoration of the power conferred by 4, 5 Anne, c. 16 s. 5. Under this statute the cases show that the judge might certify even after the taxation has begun; see *Robinson v. Messenger*, 6 A. & E. 602, and *Cobbett v. Grey*, 4 Exch. 729.

In our next issue, we shall review the remaining clauses of the Act.

Why is it that Courts of Appeal are always so unsatisfactory? The following growl comes from the antipodes. The *Melbourne Argus* says:

THE JUDICIAL COMMITTEE.—What we have to consider is whether we shall finally settle our own appeals or send them to England. The answer to this question really depends upon the improvements that can be effected in the Judicial Committee. If our appeals can be promptly despatched by such a court as one of the two highest courts in England ought to be, we should feel very little inclination to attach weight to the reasons urged in favour of a local tribunal. But there is no doubt that a strong feeling of dissatisfaction with the present machinery for finally disposing of colonial appeals is rapidly growing in this country. It is too bad that the most important cases should be left untouched for two, for three, or even for four years. When at length the time for hearing arrives, there is no security that a court will be formed such as the colonies have a right to expect. A couple of retired Indian judges, an ex-Chancellor of Ireland, whose physical infirmities necessitated his retirement from the bench of that country; perhaps, if fortune favours us, a law lord or a judge who has contrived to steal an hour from his own work—such are the usual components of a Court whose decision in all colonial cases is final and unchallengeable. . . . We earnestly trust that neither pains nor cost will be spared to provide a fitting organ for the greatest appellate jurisdiction in the world. We look, therefore, with the deepest interest for the news of the promised law reforms of the Lord Chancellor. All that we ask is that our suits shall be decided by a fully-organized English Court, and not by some stray legal casual. We think that the colonies are worth the salaries of three or four Judges, even if the

expenses of the Court should mount up to £20,000 or £25,000 a year. Such a sum does not seem unreasonable for the dignity and efficiency of the oldest jurisdiction in the kingdom, and we may fairly add, the greatest; and if England is so poor as to be unable to provide for the due performance of the Queen's primary duty, it will be well worth our while to contribute towards a Court which shall be fit to advise the Queen how to do right towards all her subjects who dwell beyond the limits of the British Isles.

SELECTIONS.

THE LAW OF DISTRESS.

It has been said that no subject has given rise to more legislation than that of distress: 3 Reeves' English Law 555 n. (last ed.). We may safely affirm that there are few branches of the law in which legislation is more urgently required. We need hardly remark that this state of things is a perfectly natural result of our system in framing legal procedure. Instead of inventing an original remedy, we usually prefer to give a new scope to an old process. Instead of revising the details of such process, we leave them untouched until their inconvenience becomes intolerable. A measure is then hastily passed to redress the most pressing grievance, but no attempt is made to remove less obvious anomalies, or to bring the ancient remedy into complete accordance with the wants and ideas of the modern society. Of this method of legislation the law of distress affords an admirable illustration. Originally derived from the Gothic nations of the Continent: (Spelman Gloss: tit. Parcus, p. 447;) this process was employed by our Anglo-Saxon ancestors to compel the appearance of a debtor in court. Under a law of Canute, passed to prevent the unfair exercise of this power, the defendant was to be thrice summoned to submit to the judgment of the hundred, and a fourth day of appearance was to be fixed by the shire; after which, if the misguided man still continued contumacious, the complainant might seize his goods: 1 Palfgrave's Rise, &c., of the British Constitution, 180. From a very early period, by the custom of the realm, as Fleta tells us, a man might seize and impound beasts which he found trespassing upon his land, until he received compensation for the injury: Fleta, 101. After the introduction of the feudal system, distress became the ordinary means of compelling tenants to perform the services and to pay the fines and amerciaments incident to their tenure: Britton, liv. I, ch. 28, 58. The barons found the seizure of the tenant's goods a more speedy and effectual mode of obtaining satisfaction than the forfeiture of his feud. Moreover they discovered in the new remedy an instrument of oppression of which they were not slow to avail themselves. They dis-

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trained for illegal fines and customs not really due, stripped farms of the whole produce, seizing goods of great value for the smallest service, and drove the chattels and cattle distrained into their castles to prevent them from being restored upon replevin. The Sovereign did not neglect this method of supplying his needs. The records of the Exchequer relate that on one occasion the burgesses of Gloucester paid a fine of three hundred lampreys that they might not be distrained to find the prisoners of Poitou with necessaries "unless they would do it of their own accord." *Madox's History of the Exchequer*, chap. 13, p. 507.

To remedy these evils a series of statutes were passed, extending from Magna Charta to Stat. 1 and 2 Ph. and M., c. 12. These enactments re-affirmed the provisions of the common law, protecting the tenant against wrongful distress, and affixed heavy penalties to some of the more audacious violations of justice.

With the decline of the feudal system the process of distress lost much of its oppressive character. It was no longer a weapon in the hands of a powerful baron, but merely a summary mode of recovering rent reserved on a contract of lease voluntarily entered into. Means of evading the process were speedily discovered. Since a distress could only be made on the demised premises, the removal of the goods afforded an easy mode of depriving the landlord of his remedy. Since a distress could only be taken for rent in arrear during the continuance of the lease, the last half year's rent, which was generally not in arrear until after the expiration of the lease, could not be distrained for. Moreover, as the distress was simply a pledge, to be retained at the risk of the landlord, until the rent was paid, it afforded no remedy in the case of a tenant who obstinately refused to redeem his goods. The current of legislation which had previously been exclusively directed to the protection of the tenant, underwent a change, and the object of nearly all the statutes subsequent to that last above-named, was to improve the remedy of the landlord. He was authorised to follow and distrain goods fraudulently removed; to distrain within a certain time after the determination of the lease; to take certain classes of goods not previously liable to distress, and a complete revolution was effected in the character of the process by the well-known Act of William and Mary, conferring on the landlord power to sell the goods distrained.

The modern statutes have almost exclusive reference to distress for rent, and it is to this branch of the process that we propose to restrict our remarks. We do not intend to discuss the policy of the law, or to suggest any serious modification of the privileges of the landlord. We take it for granted that this favoured individual should be allowed an advantage over all other creditors in the recovery of his debt. Assuming this, however, it is obviously desirable that the landlord's special

remedy should be so well-defined and simple as to save him from the danger of error, and the tenant from the temptation to avenge himself by an action at law. The process, moreover, ought to be applicable to all cases in which payments by way of rent are reserved. Above all it ought to occasion the least possible inconvenience and loss to the tenant. Let us see how far the present law of distress for rent fulfils these conditions.

At the very threshold of the subject, we are confronted with several important limitations of the right to distrain, complicated with distinctions of singular subtlety. No distress can be made, except by express agreement, for payments by way of rent reserved on leases of mere chattels; but a mixed payment of rent and corporeal hereditaments—as, for instance, rent for furnished lodgings—since it is held to issue out of the hereditaments only, may be recovered by distress. Rent reserved on a mere licence to use premises for a particular purpose, as in the common case of a letting of a mere standing for machinery, cannot be distrained for, but if the letting is of the exclusive use of a defined portion of a room in a mill, the landlord may resort to this remedy. Rent due under a mere agreement for a lease, although the tenant may have entered under it, and continued in occupation for some years without paying rent, cannot be recovered by distress; but if the tenant, after entering into occupation, promises to pay a certain rent, or even only settles it in account with his landlord, a new agreement will be presumed, under which the landlord may have the right to distrain. Under a very ancient (see *Britton*, liv. 1, ch. 28, 57b.) and wise rule of the Common Law, the remedy of distress is confined to rents of fixed amount. It would be obviously in the highest degree undesirable that the landlord should have the power of deciding for himself the amount of rent for which the seizure should be made. Where that amount has not been certainly fixed, he must resort to an action for use and occupation. According to Coke there may be a certainty in uncertainty, and it is held that a distress may be made for any rent which is capable of being reduced to a certainty. Hence a rent of 8d. per cubic yard for marl got and 1s. per 1000 for bricks made, may be distrained for, although it is obvious that questions may arise between landlord and tenant as to the amount of marl actually got, or the number of bricks actually made.

Another rule of great antiquity is, that the person distraining must possess a reversion in the demised premises: *Lit. s. 114*, *Bro. Abr. tit. Dette* pl. 39; citing *Year Book*, 43 Ed. 3, 4. Hence no distress can be made for rent reserved upon the assignment of a lease, but the reservation of a reversion of a single day will authorise a distress. A tenant from year to year underletting from year to year, has a sufficient reversion to enable him to distrain, and a mortgagor permitted by the mortgagee

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to continue in receipt of the rents of the mortgaged property, may distrain for rent due upon a lease made before the mortgage. It has been recently held that the reversion to support a distress need not be an actual reversion; that it is sufficient if it be a reversion by estoppel, and that if the tenant is actually let into occupation there is a reversion which he is estopped from denying: judgment of Blackburn, J., in *Morton v. Woods*, 87 L.J. Q.B. 248.

Other restrictions upon the landlord's power to distrain, have reference to the time at which it may be exercised, and in these we perceive a somewhat different current of judicial opinion. We have already mentioned that no distress can be made until the day after that on which the rent becomes due, and that a statutory remedy has been provided for the fraudulent removal of goods to avoid a distress. By a strict construction of the statute its operation has been limited to cases in which the goods were removed *after* the rent became due. Goods previously removed cannot be seized for rent; hence, at any time before the rent day, a tenant may carry off his chattels in full view of his landlord, and with the avowed object of avoiding a distress. A man cannot distrain for rent in the night, because, as Chief Baron Gilbert says, the tenant hath not thereby notice to make a tender of his rent, which possibly he might do to prevent the impounding of his cattle: Gilbert on Distress, 50. As night is held to extend from sunset to sunrise, it appears that, in summer at least, a distress may be made before the person whose goods are seized, is awake, and cannot be made in the evening, when he is most likely to be at hand to tender the rent.

Let us suppose, however, that a landlord duly entitled to distrain has resolved to adopt that remedy. His first step is to appoint a bailiff, and the first care of that functionary is to protect himself against the risk arising from his own incompetency, by inserting in the warrant to distrain a carefully worded indemnity by the landlord. His next proceeding is to seek admission to the demised premises, and, thanks to the numerous cases which have been decided upon this subject, the limits of what he may and may not do, in order to effect this purpose, are marked out with tolerable clearness. It is not always quite so easy to discern the principle upon which the decisions are based. The leading rule seems to be that the bailiff may enter in the ordinary mode adopted by other persons who have occasion to go into the premises: *Ryan v. Shilcock*, 7 Ex., at p. 75. It has, however, been held that he may climb over a garden wall, or enter by an open window, methods of obtaining admission which cannot be considered as usual. Since the Englishman's house is his castle, the person distraining must not break the outer door, or unhasp a window, or open an unfastened window. It is not quite obvious why the Englishman's stable, not situate within the curtilage of his house, should also be deemed

his castle; yet although the sheriff may break open the stable door, a person distraining for rent is not entitled to do so. The rule in *Semayne's case* appears to have been understood by the old authorities as prohibiting the person distraining from opening the outer door if it happened to be shut and not fastened, and a similar construction has been adopted in America, where it has been held that a sheriff's officer cannot even lift the latch of an outer door in order to open it: *Curtis v. Hubbard*, 1 Hill's Rep. 336. Recent English cases, however, have established the right of the person distraining to open the outer door in the ordinary way, but the tendency of judicial opinion appears now to be towards a stricter interpretation of the rule: *Nash v. Lucas*, L. R. 2 Q. B., 590.

The protection from distress extends only to the outer shell of the building. If the external door is open, the person distraining may break open inner doors. Hence, a lodger who has an outer door may, by keeping it locked between sunrise and sunset, prevent his landlord from availing himself of his remedy by distress; but if, although renting the upper floors from year to year, he has no outer door, he is not considered to have a castle, and the landlord's bailiff may obtrude himself under circumstances as inconvenient as those in the case in Hobart's Reports, where an entry by a bailiff, who broke open the door of a chamber where a man and his wife were in bed, was held to be lawful: Hob. 62, 263. The prohibition of breaking the outer door is also limited to the first entry of person distraining. If, after having lawfully entered he is forcibly ejected, or if, having gone out with the intention of returning, he finds himself barred out, he may break open the door to regain possession. Nice questions have arisen as to what is a sufficient possession to entitle the landlord to adopt this course. In the case of *Boyd v. Profase*, 16 L. T., N. S., 431, the defendant, in going to distrain, lifted the latch of an outer door and had got his arm and foot inside, when the servants, with considerable presence of mind, placed a table between the door and a copper which stood near, and squeezed the unfortunate man between the door and the doorpost. By inserting a pair of shears in place of his limbs he succeeded in preventing the door from being closed, and having afterwards entered by force, contended that he had previously obtained a sufficient possession to entitle him to do so. The judge, however, was of opinion that the entry by the arm, foot, and shears, not being a peaceable possession, could not have that effect. After so much elaborate care bestowed upon the definition of lawful and unlawful modes of entry, it is rather surprising to find that actual entry on the demised premises is not essential to a distress. In his judgment in *Cramer v. Mott*, the Lord Chief Justice says, that where the article seized "is just inside the door, the tenant at the door, and the landlord's wife,"

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acting as his agent, "in such a position as to be able in one moment to put her foot in the room, it must be taken that she was constructively in the room." 89 L. J., Q. B., 183.

The principle of the law is that as the landlord is supposed to give credit to a visible stock on the premises he ought to have recourse to everything he finds there: judgment of Ashhurst, J. in *Gordon v. Faulkner*, 4 T. R., at p. 568. In point of fact, however, while this rule has been rigidly enforced in some directions, it has in others been considerably relaxed. The goods on the demised premises may belong to the tenant, yet not one of them may be distrainable for rent. The goods may not belong to the tenant, yet may be seized and sold to satisfy his debt. So long as the things distrained were merely kept by the landlord as a pledge, to be returned to the owner on payment of the rent, no great hardship was inflicted on third persons, whose property was taken; but since the power of sale has been conferred on the landlord, the operation of this rule is often extremely harsh. An under-tenant or lodger who has paid his rent to his immediate landlord, is liable to have the whole of his goods seized for arrears due to the original landlord. Articles hired by the tenant from tradespeople may be sold to realise the rent. On both sides of the Atlantic this provision of the law has met with strong judicial approbation: (see observations of Blackburn, J., in 39 L. J., Q. B., 178, and of the Chief Justice in *Brown v. Sims*, 17 Serg. & Rawle, 188,) and in several States of the American Union it has been abolished. A bill was introduced by Mr. Sheridan into the House of Commons during the present Session to relieve the goods of undertenants and lodgers from the liability to be distrained for rent due to the original landlord, and after being read a second time was referred to a Select Committee. It is to be hoped that this very reasonable reform may speedily be effected. We may remark in passing that while goods belonging to third persons are liable to distress, animals *feræ naturæ* are exempted from distress on the express ground that they belong to nobody.

From the circumstance that the distress was originally a pledge, to be restored to the tenant when satisfaction was made, it naturally followed that nothing could be taken which was incapable of being restored in the same plight as when it was seized. Hence perishable articles, such as milk and meat, cannot be distrained, and fixtures which cannot be severed without detriment, are also exempt from distress. This doctrine has, however, been extended to the class of things known as tenant's fixtures, an essential attribute of which is, that they are capable of being removed without material damage. Since it was considered unjust to deprive the tenant of the means of redeeming his pledge, a conditional protection was afforded to his implements and stock. The tools of the workman, the cattle and sheep

of the farmer, and the books of the scholar can only be seized if there are no other sufficient goods on the premises to satisfy the distress. The exemption of goods from distress while in the hands of a tradesman rests on a different footing, and appears to be based on the benefit derived by the commonwealth from the exercise of a public trade; See *Muspratt v. Gregory*, 1 M. & W., p. 645. Originally the protection appears to have been almost exclusively limited to goods sent to the tenant to have labour bestowed upon them and to be returned in an altered condition: (Co. Lit., 47 a.), but the case of *Gilman v. Elton*, 3 B. & B., 75, extended it to goods sent in the way of trade for the purpose of sale, and it has been recently decided that articles pledged with a pawnbroker cannot be distrained by his landlord, although they may have remained in the possession of the pawnbroker for more than a year without any payment of interest: *Suire v. Leach*, 18 C. B., N. S. 479. By a somewhat arbitrary restriction the exemption from distress is denied to goods placed in the hands of the tenant merely with the intent that they shall remain on the premises: hence horses and carriages sent to a livery stable-keeper: *Parsons v. Gingell*, 4 C. B., 545; wine sent to a wine-warehouseman to be matured: *Ex parte Russell*, 18 W. R. 758, and probably also furniture deposited with a furniture warehouseman, may be distrained for rent due by the tenant, although his trade consists exclusively in the reception and care of the articles deposited with him.

Not only must the person distraining exercise the greatest care as to the description, but also to the value of the goods distrained. He is bound to ascertain that such value does not greatly exceed the amount of the arrears of rent. On the other hand he must take sufficient to cover his demand, for, in general, no second distress can be made for the same arrears of rent. He is to estimate the value of the goods seized at the price they would fetch at a broker's sale; but he may be liable to an action for excessive distress, although the goods fairly sold under the distress did not in fact realize the amount of the rent and costs.

The processes of seizure and impounding have long ceased to possess any importance. Almost any equivocal expression of an intention to seize will suffice, without touching the goods or entering upon the demised premises. A mere refusal by the landlord or his agent to permit chattels to be removed until the rent is paid, has been held to amount to a seizure: *Cramer v. Mott*, L. R., 5 Q. B., 837. In like manner impounding, which in ancient times necessarily involved the removal of the goods, may now in many cases be effected without the slightest change in their ordinary position, and without locking up the premises or leaving any one in possession: see *Swann v. Falmouth*, 8 B. & C. 456. It follows that the acts of seizing and impounding may be simul-

THE LAW OF DISTRESS.—SEIZURE UNDER FI. FA.

taneously effected, and that the period between these acts during which the tenant might formerly tender the rent and expenses and obtain an immediate return of his goods, has no longer any existence. At common law, a tender after the goods had been impounded was unavailing, and this singular result ensued, that whereas the only object of permitting a landlord to distrain was to enable him to obtain payment of his rent and costs, he might refuse to receive such payment, and in spite of the tender, proceed under the statute to sell the goods distrained. Moved by the grievous hardship to the tenant of this state of the law, the judges have sanctioned an action on the equity of the Stat. 2 W. M., sess. 1, c. 5, in case of the sale of the goods after a tender made within the five days allowed to the tenant to replevy.

The provisions of the statute conferring the power to sell the goods distrained, have, on the whole, been somewhat strictly construed. The notice of distress must be in writing, and the inventory must specify with reasonable certainty the articles taken; the latter must in all cases be appraised by two sworn appraisers, and the landlord is not permitted to appraise the goods, or to buy them under the distress.

In reviewing this subject, the chief point calling for remark is the fact that the whole conduct of the process is left in the hands of the person least concerned to protect the interests of the tenant, and most inclined to exercise harshly the rights given him by law. The power of distress to compel appearance on civil process was at a very early period placed in the hands of the sheriff acting by virtue of the king's writ; but upon a distress for rent, the law still "allows a man to be his own avenger, and to minister redress to himself." To confer on an interested individual the power of seizing and selling the goods of his adversary, is to afford an obvious temptation to unfair dealing: and the existing checks on abuse must be admitted to be entirely inadequate. Notice of the distress is to be given to the tenant; but this notice need not accurately state the amount of rent for which the distress is made. The goods are to be appraised by two sworn appraisers; but since these persons are employed by the landlord, and are permitted to purchase the goods at the appraised value, it is obviously their interest to make as low an appraisement as possible. The landlord is to sell at the best price; but goods sold at the appraised value are presumed to have been sold for the best price. The overplus of the sale is to be left in the hands of the sheriff, under-sheriff, or constable, for the owner's use; but since no scale of charges for distresses for arrears of rent exceeding 20% has been established, the landlord and his bailiff may deduct a large sum for the costs of the distress and sale. On the other hand, the temptation to vexatious litigation on the part of the tenant

is scarcely less powerful. The existing process of distress is so full of legal pitfalls that a person who desires to revenge himself upon his landlord for distraining, can hardly fail to find a pretext for involving him in an action. Of all the various sources of litigation, however, the employment of unskilled bailiffs appears to be the most fruitful. Every inexperienced auctioneer deems himself qualified to act in this capacity, and the landlord has frequently to pay heavily for the ignorance of his agent.

But while responsible for any irregularity in the conduct of the distress, the landlord is not liable for illegal acts committed without his knowledge or sanction by the person employed to distrain, and the consequence is that for grave injuries, such as the taking of goods exempted from distress, the tenant's only remedy is against the bailiff, who may be a mere man of straw. It appears to us that much of the evil at present attendant upon the exercise of the right of distress for rent might be obviated by the adoption of a similar provision to that contained in the New York Revised Statutes (Vol. II., 504, ss. 2, 8, 8), under which every distress must be made by the sheriff upon the previous affidavit of the landlord or his agent, stating the amount of rent due, and the time when it became due. The present process of distress, as Lord Mansfield long ago pointed out, is neither more nor less than an execution, and there can be no reason why it should be conducted in a different manner from other executions. As at present conducted it cannot be said to afford a remedy which is either safe for the landlord or just to the tenant.—*Law Magazine*.

SHERIFF—SEIZURE UNDER FI. FA.

Gladstone v. Padwick, Ex. 19 W. R. 1064, L. R. 6 Ex. 208.

The question what is an actual seizure or taking of possession, like the question, what is a continuing possession, is one rather of fact than of law, but stands so much upon the border that an illustrative instance is often of great service. In the present case a writ of *fi. fa.* was executed by a seizure at the mansion-house, accompanied by a declaration that it was intended as a seizure of all the goods on the estate; and this was held to be an "actual seizure" of the stock on the home farm (including some outlying fields) and of goods in the farm-house occupied by the bailiff. It was, therefore, held to bind them in favour of the execution creditor, as against the holders of a bill of sale executed half-an-hour afterwards, who claimed the benefit of section 1 of Mercantile Law Amendment Act, 1856. The general rule involved in this decision is that where there is a single holding, the lands of which are continuous or separated by only a moderate interval, a seizure at the principal

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place (if there be one) is effectual over the entire extent of the holding. What the effect would be if there were no such principal place, and a seizure were made in some one field in the name of the whole, is another question; it may probably be inferred from the language used by the Court, and from the reason of the thing, that it would be sufficient in a race for priorities; but in such a case it would certainly be prudent to extend the manual possession as far as possible. And in every case an undersheriff who understands his business will take care to follow up his act of seizure as quickly as possible by the usual steps for indicating and retaining his possession; in the present case the fact that he did so was relied on as indicating the character and intention of his act.

A more difficult question might arise if the premises which constituted the single holding were separated by a considerable distance, and the seizure took place at only one of them; and although there seems reason to say that even this would be effectual, if the intention were that the seizure should extend to the whole, and the intention were in due course followed out, the point cannot be considered as clear, and was certainly not decided in the present case.—*Solicitors' Journal*.

An interesting case affecting the rights of unprofessional advocates to appear in court was heard in Easter Term by the Queen's Bench in Ontario. The application to the court was for a prohibition to restrain certain unprofessional persons from conducting suits in the Division Courts, which are tribunals analogous to our County Courts. Looking at the Canadian Statutes the court came to the conclusion that it was manifest that the Legislature intended that only barristers and attorneys should be authorised to conduct or carry on in any court, any kind of litigation, and that consequently unprofessional persons were not entitled to have audience in the prosecution or defending suits in the Division Courts. It was observed by Mr. Justice Wilson that "It can only be a case of great necessity which will warrant a departure from the general, approved, and settled practice of the courts. The policy of the Legislature on this subject has plainly been to exclude all unqualified and non-professional practitioners, and Judges should give effect to that legislation." Although it was held in *Collier v. Hicks* (2 B. & Ad. 662), that "any person, whether he be a professional man or not, may attend as a friend of either party, may take notes and quietly make suggestions and give advice," the Judges in *Tribe v. Wingfield* said that "they could never lend their authority to support the position that a person who was neither a barrister nor an attorney, might go and play the part of both; and in such a case there was none of that control which was so useful where counsel or attorneys were employed."—*Law Times*.

CANADA REPORTS.

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SUPREME COURT.

DODSON v. GRAND TRUNK RAILWAY COMPANY.

Common carriers—Responsibility at common law—Special contract.

As the (English) Carrier's Act of 1830 and the Railway and Canal Traffic Act of 1854, have not been adopted in Canada, the responsibility of a common carrier here rests wholly upon the principles of the common law, and may be so limited by special contract that he shall not be liable, even in cases of gross negligence, misconduct, or fraud on the part of his servants.

[Halifax, August 7, 1871.]

In February, 1868, the plaintiff imported from Montreal, via Portland, by the defendants' railway, one hundred dressed hogs, under the usual shipping papers signed by his agent and by the Managing Director of this Company, and forming a special contract which is set out in the amended writ. By the second condition, fresh fish, fruit, meat, dressed hogs and poultry or other perishable articles, were declared to be carried only at the owners' risk; while by the 16th condition in respect to live stock, the owner undertook all risk of loss, injury, damage and other contingencies in loading, unloading, transportation, conveyance and otherwise, no matter how caused.

On arrival the hogs were found to be damaged to the extent of \$488, and the jury found upon the trial that the injury was caused by the negligence of the defendant's servants, and gave a verdict for the plaintiff subject to the opinion of the court on all legal objections.

Hon. J. McDonald, Q. C., for the plaintiff.

Hon. H. Blanchard, Q. C., for defendants.

SIR WM. YOUNG, C. J.—There was no imputation, as we read the amended counts, nor was there any evidence, of wilful wrong, destruction, or wanton abuse of the property, but only of mismanagement, carelessness, and neglect which, in the opinion of the jury, rendered the defendants liable; and the court would undoubtedly confirm that finding, unless it should appear that the defendants are protected by the terms of the special contract.

Upon the pleadings and the evidence that is the sole question before us. It is to be decided according to the principles of the common law, neither the English Carriers Act of 11 Geo. 4, & 1 Wm. 4, nor the Railway and Canal Traffic Act of 1854, being in force in this Province.

The numerous cases cited upon the argument have, therefore, only a partial application, and will aid us chiefly by way of illustration and analogy. They are reviewed at much length and with singular ability in the case of *Peck v. North Staffordshire Railway Company*, 10 H. L. Cas. 478, decided in 1863. Several of the Common Law Judges were called in to assist the Lords in that case, and Mr. Justice Blackburn delivered an elaborate opinion, which was endorsed by Lord Wensleydale (better known as Baron Parke), both of them, as we all know, very eminent lawyers. Of the opinions in this leading case we will, of course, avail ourselves, as afford-

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ing a sounder view of the decisions, and of higher authority than any we could ourselves prepare.

According to Mr. Justice Story, (Commentaries on the Law of Bailments, 5th Ed. Sec. 549) "Common carriers cannot by any special agreement exempt themselves from all responsibility, so as to evade altogether the salutary policy of the Common Law. They cannot, therefore, by a special notice, exempt themselves from all responsibility in cases of gross negligence and fraud, or, by demanding an exorbitant price, compel the owners of the goods to yield to unjust and oppressive limitations of their rights. And the carrier will be equally liable in case of the fraud or misconduct of his servants, as he would be in case of his own personal fraud or misconduct." Judge Blackburn (10 H. L. Cas. 494) argued that the weight of authority was in 1832 in favor of this view of the law, but he added that the cases decided in the English Courts between 1832 (*i.e.* two years after the passage of the Carriers Act, but not depending upon it) and the year 1854, established that the doctrine so enounced by Story was not law, and "that a carrier might, by a special notice, make a contract limiting his liability even in the cases there mentioned, of gross negligence, misconduct or fraud on the part of his servants;" and the judge held that "the reason why the Legislature intervened in the Railway and Canal Traffic Act, 1854, was because it thought the companies took advantage of those decisions (in Story's language) to 'evade altogether the salutary policy of the Common Law.'"

It is to be observed, however, while recognizing such power, that the right of making special contracts or qualified acceptances by common carriers, seems to have been asserted in early times. Lord Coke declared it in *Southcot's Case*, 4 Co. Rep. 84 (Vol. 2 p. 487), where he says "that if goods are delivered to one to be delivered over, it is good policy to provide for himself in such special manner, for doubt of being charged by his general acceptance." See also the case of *Mors v. Slue*, 1 Ventr. 238. This, says Story, is now fully recognized and settled beyond any reasonable doubt; and he cites a whole array of cases. See also 1 Parsons on Contracts, 708-715.

In *Nicholson v. Willan*, 5 East 512, decided long before the passage of the Carriers Act, Lord Ellenborough said that there is no case to be met with in the books in which the right of a carrier to limit by special contract his own responsibility has ever been by express decision denied,—the Court "cannot do otherwise than sustain such right, however liable to abuse and productive of inconvenience it may be, leaving to the Legislature, if it shall think fit, to apply such remedy hereafter as the evil may require." It is remarkable that just fifty years elapsed after this wise suggestion in the courts before it was adopted in Parliament.

In *Carr v. Lancashire & Yorkshire Railroad Company*, 7 Ex. 707, decided in 1852, on which the 16th condition we have cited as to live stock is plainly founded, where the jury found as a fact that the plaintiff's horse had been injured through the gross carelessness of the defendants, they had guarded themselves by a notice in these words: "This ticket is issued subject to the owner's undertaking all

risks of conveyance whatsoever, as the company will not be responsible for any injury or damage, (howsoever caused) occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles." The finding of the jury was not complained of, just as we approve of the finding of the jury here, yet the Court of Exchequer held that this was a special contract by which the plaintiff had taken upon himself all risk, just as in this case the defendants stipulated that the hogs were carried "only at the owner's risk"—the only difference being in the words "howsoever caused," or "no matter how caused" on which we will presently remark. "It is not for us," said Baron Parke, "to fritter away the true sense and meaning of these contracts. * * * If any inconvenience should arise from their being entered into, that is not a matter for our interference, but it must be left to the Legislature, who may, if they please, put a stop to this mode which the carriers have adopted of limiting their liability. We are bound to construe the words used according to their proper meaning; and according to the true intention of the parties as here expressed, I think the defendants are not liable."

This case was much relied on by the defendants' counsel, with that of *Wilton v. Atlantic Mail Steam Company*, 10 C. B. N. S. 453, where the same principles were applied to carriers by sea, and the company was relieved of liability for the negligence of the master, by virtue of a special contract which provided that they should not be accountable for luggage unless a bill of lading had been signed therefor.

The decisions in favour of railroad companies, culminating in the case from 7 Ex., brought down upon them,—to use the strong expression of one of the English judges,—the Railway and Canal Traffic Act of 1854, 17 & 18 Vic. chap. 81, by the 7th section of which, "Every such company shall be liable for the loss of, or for any injury done to live stock or goods, occasioned by the negligence of their servants, notwithstanding any notice, condition, or declaration made and given by such company, contrary thereto, or in any way limiting such liability—every such notice, condition, and declaration being hereby declared to be null and void." Then follow five provisos, the first of which declares that "Nothing herein contained shall be construed to prevent said companies from making such conditions in the premises, as shall be adjudged by the court or a judge, before whom any question relating thereto shall be tried, to be just and reasonable."

The fourth proviso declares that "No special contract between such company and any other person respecting the forwarding or delivery of live stock or goods shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such animals or goods respectively for carriage." This proviso and the practice under it, have doubtless suggested the form of the shipping papers or contracts used by the Grand Trunk Railway Company.

Subsequent to this Act of 1854, the cases have mainly turned on the justice and reasonableness of the conditions imposed by railroad companies, and the fact that this is to be settled by the

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courts, affords to the public an effective and most valuable protection. It is true that the 7th section, with its host of provisos, is not spoken of in the most complimentary terms. Lord Westbury assails it for its cumbrous language, and Mr. Justice Willes calls it "an element of confusion." Its true construction, too, has led to great variety of opinion. Still, though susceptible of improvement, it has been found a valuable enactment, and in the principal case from the House of Lords, it will be instructive to review the terms of the condition then in controversy, and the opinions it elicited.

The action was brought for injury done to three marble chimney pieces sent by railway, and the Company sought to protect themselves by the following condition, "That the company shall not be responsible for the loss of or injury to any marbles, musical instruments, toys, or other articles, which from their brittleness, fragility, delicacy, or liability to ignition, are more than ordinarily hazardous, unless declared and insured according to their value." It appeared by the evidence that the price of the carriage was 55s. stg., per ton. Ten per cent. of the value was demanded for insurance, which the consignor declined paying and sent the chimney pieces uninsured—their value was £210, and the injury done to them was estimated at £52.

To persons who are sometimes astonished at the difference of opinions in the courts of justice, it may give a curious and useful lesson, to mark the variety in this case. It was tried before Mr. Justice Erie, who thought the condition reasonable and just, and directed a verdict to be entered for the defendants. Upon argument in the Queen's Bench, (1 E. B. & E. 958) Lord Campbell and Mr. Justice Crompton took the opposite view, and judgment was given for the plaintiff. This decision was reversed in the Exchequer Chamber (Ib. 980), by Chief Baron Pollock, Mr. Baron Martin, Mr. Justice Willes, Mr. Baron Watson, and Mr. Baron Channel, the judgment was given for the defendants, Mr. Justice Williams dissenting. Of the judges in the House of Lords, besides some of the above called in to assist, Chief Justice Cockburn and Mr. Justice Blackburn gave their opinions for the plaintiff. So that of these common law judges, including two Chief Justices and the Chief Baron, it turned out that five were in favor of the plaintiff and six for the defendants. In the House of Lords, the then Lord Chancellor (Lord Westbury) after remarking with deference that he could not believe that there was in the matter itself any very serious difficulty, combined with Lords Crauworth and Wensleydale in giving judgment for the plaintiff, thus reverting to the original judgment which had been reversed in the Exchequer Chamber; while Lord Chelmsford thought the judgment should be for the company.

Now as to the condition itself, which is the converse of the second condition in the case in hand, it was remarked that the defendants had chosen the very words used by the Legislature in the Carriers Act, and that these very words were determined in *Hinton v. Diddin*, 2 Q. B. 646, to exempt the carrier from liability for loss or injury occasioned by gross negligence of the carrier's servants. Mr. Justice Crompton

observed, that he had great difficulty in making a refined distinction between a stipulation to be free from any loss or injury, and to be free from responsibility for any injury or damage, "however caused," which the Court of Exchequer decided in *Oarr v. The Lancashire & Yorkshire Railroad Company*, to include cases of gross negligence, "but," he added, "I think that a condition that the company shall not be responsible for losses (which appears to me to include losses by every species of gross negligence,) ought not to be held just and reasonable." It is to be noted that the judges, who were for the defendants, did not dissent in substance from this view, but thought that in the true construction of the condition, losses occasioned by gross negligence did not come within it.

The court of ultimate appeal, by a majority of three to one, forming with the other judges a majority of eight to seven of the judicial minds employed upon this important case, decided that the condition imposed by this company was unreasonable and unjust, and the minority did not differ with them as to its essential character. Now, this is an inquiry of the highest practical importance to us. This court has now unanimously held that by the law as it obtains in this Province, and probably in all the other Provinces of the Dominion, there is no law to restrain the Grand Trunk Railway Company from exacting such terms and imposing such conditions as they think fit, in their printed papers which the public using the railway must accede to. We give no opinion whether the condition in the case in hand is reasonable or otherwise; much is to be said for, and something against it. But as it is essentially the same with the condition in *Peek v. North Staffordshire Railway Company*, it is well to ponder on the significant words of the Lord Chancellor that "the necessary effect of such a contract would be, that it would exempt the company from responsibility for injury however caused, including therefore, gross negligence and even fraud or dishonesty on the part of the servants of the company; for the condition is expressed without any limitation or exception" (p. 567). In a passage we have already cited, Mr. Justice Blackburn, with the apparent assent of the Law Lords, and certainly with that of Lord Wensleydale, declared that at common law a carrier might by a special notice make a contract, (and the Queen's Bench of Ontario has decided that there is no distinction between a notice and a condition forming a part of a special contract*) limiting his responsibility even in the cases of gross negligence, misconduct or fraud on the part of servants!

We are far from thinking that the Grand Trunk Railway Company would push its advantages or avail itself of the law to such extremes. But as the British North America Act, 1867, in the 91st and 92nd sections declares that exclusive legislative authority belongs to the Parliament of Canada over "lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Provinces with any other or others of the Provinces, or extending beyond the limits of the Province," we think it

* *La Pointe v. The Grand Trunk Railway Company*, 26 U. C. Q. B. 479—Edm. 1^a J.

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[Eng. Rep.]

right to call the attention of the Dominion Government and the Legislature to what we conceive to be the actual state of the law upon a question so deeply affecting the trade and commerce of the country.

It may be that with a view to their protection, Parliament may deem it advisable to enact a law for the whole Dominion, founded on the Imperial Act of 1864, with such modifications as the experience of the mother country and the decisions since that period will naturally suggest.

In the case in hand, we are constrained by the authorities to set aside the verdict for the plaintiff, and award the defendants a new trial with costs of argument.

Rule absolute.

Plaintiff's attorney, *Mr. Peter Lynch.*

Defendant's attorney, *Mr. J. N. Ritchie.*

[We are indebted to Mr. N. H. Meagher, student-at-law, Halifax, as well for the above report as for others previously received.—*Eds. L. J.*]

ENGLISH REPORTS.

COMMON PLEAS.

THE QUEEN V. WHITE.

Abandoning child whereby life was endangered—Child allowed by father to remain in danger—Misdemeanour—24 & 25 Vic. c. 100, s. 27.

The prisoner was convicted under section 27 of 24 & 25 Vic. c. 100, of having unlawfully abandoned and exposed a certain infant under the age of two years whereby its life was endangered.

The prisoner and his wife were the parents of the child, which was about nine months old on the 1st of September, 1870, the time mentioned in the indictment. They had been living apart for three weeks, when the mother came to the house of the prisoner at seven o'clock in the evening, laid the child down outside the door, and called out, "Bill, here's your child; I can't keep it; I am gone." She then went away, and was not seen again that night. Shortly afterwards the prisoner came out, stepped over the child, and walked away. About ten o'clock the prisoner returned, and was told that the child was lying outside the house, in the road; he then refused to take it in. About one a.m. a police constable who had been sent for found the child lying in the road, cold and stiff; he took charge of it, and by his care it was restored to animation. At 4.30 a.m. the prisoner admitted to the constable that he knew the child was in the road.

Held, that the prisoner was properly convicted.

[19 W. R. 783, C. C.R.]

Case stated by the Chairman of Quarter Sessions for the County of Southampton. The prisoner was indicted at the Quarter Sessions for the County of Southampton, held at Winchester, on the 19th day of October, 1870, under the Act 24th and 25th Vic. c. 100, s. 27, for that he did on the 1st day of September, 1870, unlawfully and wilfully expose and abandon a certain child, then being under the age of two years, whereby the life of the said child was endangered. It appeared from the evidence that Emily White (the wife of the prisoner) was the mother of the child, which was about nine months old at the time mentioned in the indictment. On that day she had an interview with her husband from whom she had been living apart since the 11th of August of the same year, and asked him if he intended to give her money or victuals, he passed by her without answering, and went into his house; this was about 7 p.m.; his mother

shut the wicket of the garden and forbade his wife from coming in. The wife then went to the door of the house, laid the child down close to the door, and called out "Bill, here's your child, I can't keep it, I am gone," she left and was seen no more that night. Shortly after the prisoner came out of the house, stepped over the child, and went away. About 8.30 two witnesses found the child lying in the road outside the wicket of the garden, which was a few yards from the house door, it was dressed in short clothes with nothing on its head; they remained at the spot till about 10 p.m.; when the prisoner came home, they told him that his child was lying in the road, his answer was "it must bide there for what he knew and then the mother ought to be taken up for the murder of it." Another witness Maria Thorn (the mother of the wife) deposed also to the fact that about the same time in answer to her observation that he ought to take the child in, he said "he should not touch it, those that put it there must come and take it." She then went into the house. About 11 p.m. one of the two witnesses went for a police-constable and returned with him to the place about 1 a.m., when the child was found lying on its face in the road with its clothes blown over its waist and cold and stiff. The constable took charge of it, and by his care it was restored to animation. At 4.30 a.m. the constable went to the house and asked the prisoner if he knew where his child was; he said "no." On being asked if he knew it was in the road he answered "yes." It appeared that during the time which elapsed between the prisoner leaving his house about 7 p.m. and his return about 10 p.m., he had been to the police-constable stationed at Beaulieu, and told him that there had been a disturbance between him and his wife, and wished him to come up and settle it, but he did not say anything about the child.

The prisoner's counsel objected that upon these facts there was no evidence of abandonment or exposure under the Act by the prisoner.

The Court overruled the objection. The jury found the prisoner guilty.

The question for the Court is, whether the prisoner was or was not properly convicted.

April 29.—No counsel appeared.

Curr. adv. vult.

May 6.—BOVILL, C. J.—We have considered this case and are of opinion that the conviction was right. Section 27 of 24 & 25 Vic. c. 100, declares it to be a misdemeanour unlawfully to abandon or expose any child under the age of two years, whereby the life of the child shall be endangered. The words are in the alternative, and if either abandonment or exposure is proved, the offence is complete. The prisoner was the father of the child, and was bound, not only morally, but legally, to provide for and protect it; he was aware that it had been deserted by its mother, and the evidence is clear that he had the opportunity of taking it under his protection. The only question which we have had to consider is, whether there was any evidence to go to the jury of abandonment or exposure by the prisoner, whereby the child's life was endangered. I am clearly of opinion that upon the facts stated the jury not only might, but ought to have convicted.

[Eng. Rep.]

RE AN ARTICLED CLERK.—JOYCE V. COTTRELL.

[Eng. Rep.]

The life of the child was in danger. The prisoner must have been well aware that this was the case, and his responsibility and duty with respect to it were very different from that of a stranger.

MARTIN, B.—I concur, though at first I felt some doubt whether without extending the words of the statute beyond their ordinary meaning, we could hold that the father, not having the actual possession of the child, could be said to have abandoned or exposed it. But he was legally bound to protect the child, and failed to do so, and on the facts I think he did abandon it.

BRAMWELL, B.—I am of the same opinion.

CHANNELL, B.—I have been requested by my brother Byles, who was present on Saturday last, to say that he agrees that the conviction was right. I also have considered the case and am of the same opinion.

BLACKBURN, J.—I think there was evidence for the jury that the prisoner abandoned the child. If a stranger to it had been charged with the same offence under similar circumstances, I think he would have been under no legal obligation to protect it, and would have been entitled to an acquittal. There might be a moral duty, but it would be one of imperfect obligation, for breach of which he could not be convicted. But the father was legally bound to protect and maintain his own child, and if he had failed to do so, and it had in consequence died, there can be no doubt that he would have been guilty of manslaughter. He is bound to protect the child, and though no mischief may in fact have happened to it, I think that if it was in danger, and he wilfully left it in that condition, he abandoned it by neglecting a duty, which it is clear that physically he was in a position to perform.

Conviction affirmed.

QUEEN'S BENCH.

Re AN ARTICLED CLERK.

Attorney—Articled clerk—Sufficiency of service—6 & 7 Vic. c. 73, ss. 3, 6, 13.

On application by an articled clerk to be admitted as an attorney it appeared that, upon the execution of the articles and without any service under them, he became pupil to a conveyancer and continued so for more than a year. Upon the expiration of his pupillage the articles were assigned to another attorney, and he served under that and subsequent assignments for more than four years.

Held, that a year of the pupillage was equivalent to a year's service under the articles, and that he was entitled to admission.

[19 W. R. 780.—Bail Court.]

C. Wood, on behalf of an articled clerk, applied that he might be admitted as an attorney. It appeared by the affidavit that the applicant had been articled to his father, an attorney, and that immediately upon the execution of the articles, and without service under them, he entered the chambers of a conveyancer as a pupil. He remained there more than a year, and upon the expiration of that time his articles were assigned to another attorney; he served under that and subsequent assignments for more than four years. The Incorporated Law Society refused to admit the applicant on the ground that as he had not served at all under the articles to

his father, but had been a pupil to a conveyancer during the whole continuance of those articles, he was not entitled, by section 6 of 6 & 7 Vic. c. 73, to reckon twelve months' pupillage with the conveyancer as service under those articles.

6 & 7 Vic. c. 73, s. 3 enacts that, except as thereafter mentioned, no person shall, after the passing of the Act be admitted as an attorney, unless he shall have been bound by contract in writing to serve as clerk for and during the term of five years to a practising attorney or solicitor, and shall have duly served under such contract for and during the said term of five years.

Section 6 provides that any person so bound, and who shall be and continue as pupil with any practising barrister for any part of the said term not exceeding one whole year, shall be capable of being admitted as if he had served the whole period of the five years with the attorney or solicitor to whom he was bound.

Section 13 provides for an assignment of the articles in certain cases, and enacts that service under the new contract shall be good and effectual.

BLACKBURN, J.—was of opinion that by section 6, a year of the period spent by the applicant as a pupil was equivalent to a year spent under the original articles, though there had been no actual service under those articles: and that, as by section 13, four years' service under assignment was as effectual as four years' service under the original articles, the applicant was entitled to admission.

Order accordingly.

CHANCERY.

JOYCE V. COTTRELL.

Administration—Maintenance—Claim by mother.

Advances made by a mother for the maintenance of a son during his minority will be regarded as acts of bounty, unless there is evidence of an intention of claiming repayment.

In order to establish a claim for repayment of money expended for maintenance subsequent to majority, a contract must be shown.

[19 W. R. 1076—V. C. W.]

This suit, which now came before the Court on further consideration, was one for the administration of the estate of Joseph Cottrell, who died intestate in September, 1861, and the question which now arose was whether his mother was entitled to claim out of her son's estate a sum of £920, which she had expended for his maintenance during his minority and after he attained twenty-one years of age.

A suit of *Cottrell v. Cottrell*, had previously been instituted for the administration of the estate of Samuel Cottrell, the father of the intestate, who had by his will bequeathed a sum of £100 to each of his children, and a further sum of £1,000 to his son Joseph. The will contained a declaration that the legacy should not be paid to his son Joseph until he attained the age of twenty-eight years, at the discretion of his guardians, but the interest was directed to be applied for his maintenance and education. Accordingly in that suit an inquiry was directed as to who had maintained Joseph Cottrell from the date of his father's death, and what was proper to be allowed in that respect, and to what date, and the chief clerk certified that Joseph Cottrell had been

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maintained by his mother until his death, and £920 was a proper sum to be allowed in respect thereof. In the order made on further consideration the question was left open.

In the present suit the claim was again brought forward against the estate of Joseph Cottrell.

E. Russell Roberts stated the case for the opinion of the Court.

Dickenson, Q. C., and Lake, for the widow, submitted that the finding of the chief clerk, which must be taken to have been made on the request of all parties, was decisive, and that the claim must be allowed. They relied upon *Bruin v. Knott*, 1 Phillips, 572.

Chapman Barber and Bedwell, for a brother of the intestate, the administrator, contended that there was no necessity for the inquiry—no claim could be made by the mother after she had allowed her son to receive his legacy, which she might have retained in respect of his maintenance during his minority. After he attained twenty-one she must show a contract. There was no evidence in support of any such contract.

Langley, for a sister of the intestate, contended that the certificate was not binding. If the son had been maintained by a stranger to the suit of *Cottrell v. Cottrell* he could not, as a creditor against Joseph's estate, be bound by a certificate made in a suit when he was not represented on the merits, but the question must in this cause be tried over again. The maintenance was an act of kindness and charity, and the claim must be disallowed: *Worthington v. McCraw*, 5 W. R. 124, 23 Beav. 81; *Grove v. Price*, 26 Beav. 105, 8 W. R. Ch. Dig. 84.

Dickinson, Q. C., in reply.

WICKENS, V.C.—The only question in this case is, whether there is or is not a debt against the estate of Joseph Cottrell, in respect of the sums expended for his maintenance by his mother. That question resolves itself into two heads; first, with reference to the sums expended during his minority for maintenance, and secondly, the sums expended after majority.

In general I think it may be said that when a mother maintains a child, although not under any legal liability, she does so under one of three different views—first, with the intention of afterwards claiming the amount as a debt due to her; secondly, as an act of maternal duty, kindness, or bounty, that is, as a gift; or, thirdly, she may make the advance on an intermediate footing, that is to say, in the expectation of being repaid out of some fund under the jurisdiction of the Court, which it would allow to be so applied, although such expenditure had not been previously sanctioned by the Court.

Of course I apprehend that if a mother or any other person confers a gift, intending it as a gift at the time, she cannot afterwards, under a changed state of circumstances, come to this Court and say it was a loan. In the present case the question is, first, did the mother make the advances during the minority with the intention of afterwards claiming as a creditor? I see no reason to believe that she did so, and therefore I hold in this respect that there was no debt for maintenance during the minority. It is probably not necessary to consider whether she made these advances during minority with the intention of

afterwards claiming them out of a fund under the control of the Court, but in my opinion it is clear she did not from what took place after the son came of age; for I cannot conceive stronger intimation of an intention not to claim any repayment than is manifested by her handing over the sum of £1,000 as she did. I take it, therefore, as clear for the present purpose that, whether these advances were actually intended as bounty or not during the minority, there was nothing to create a debt. The fund I am now dealing with is not under the control of the Court otherwise than for the purpose of administration of the intestate's estate, and I am now trying the question as against the fund, as a jury would try the question in an action of *assumpsit*.

As to what took place after majority, the claim has entirely failed. What the mother has to show is a contract, and she shows none. I am perfectly convinced in my own mind that she never, during these six years between the minority and the death of Joseph Cottrell, had the smallest idea of claiming repayment of anything from him. Nothing would have surprised him more than if she had intimated such an intention to him, and it would probably have caused an alteration in their arrangements. She was bound to intimate such an intention to him; but she never, as I believe, formed such an intention, and certainly never intimated it.

As to what took place before my predecessor, there is a little difficulty, because some part of the case was dealt with in the former suit; but I do not know that I am technically bound, by the finding upon the certificate that the sum was proper to be allowed, to hold that that constituted it a debt against this estate. Although all the parties were present, the precise question before me could not have arisen in the former suit, and I do not think that the certificate is conclusive upon me to hold that there was any debt, and being convinced that there was none, I dismiss the summons. The claim will be disallowed.

BAIN V. SADLER.

Administration suit—Legal and equitable assets—Trustee and executor—Retainer.

A trustee for sale of a testator's real estate for the payment of debts has no right of retainer for a debt due to him from the testator, although he may be also executor.

Hall v. Macdonald, 14 Sin. 1, discussed.

Proceeds of sale of testator's real estate directed by him to be sold for payment of debts, the sale being made under an order of the Court in an administration suit, are equitable assets. [19 W. R. 1077—V. C. W.]

This was a creditor's suit for the administration of the estate of Henry Dike, who died in 1867, having by his will devised his real and personal estate to the defendant, John Sadler, and another, upon trust to sell so much as might be necessary for the payment of his debts. The will was proved by John Sadler alone.

The testator was indebted to the plaintiff, William Bain, and various other persons at the time of his death. By a decree made at the hearing of the cause various accounts and inquiries were directed.

It appeared from the certificate of the chief clerk that the personal estate of the testator was insufficient for the payment of his debts; that John Sadler had received the personal estate of

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the testator which, after deducting certain sums allowed to him, left a balance in his hands; this he claimed to retain in part payment of a debt of much larger amount due him from the testator.

Part of the testator's real estate had, previously to the filing of the bill, been sold, and subsequently the residue was sold by order of the Court; the proceeds of these sales were received by the defendant, John Sadler, and out of them he claimed to be entitled to retain a sum sufficient to satisfy the balance of the debt due to him.

On a summons taken out for the payment of the proceeds of the real estate into court, the Vice-Chancellor Stuart decided in favour of the right of retainer, subject to the taking of certain accounts.

It was admitted that the defendant John Sadler was entitled to retain the balance of the personal estate as legal assets, and the question was now brought before the Court whether he had any right of retainer as executor over any part of the proceeds of the real estate, for the payment of which into court a summons had now been taken out.

Dickinson, Q. C., and W. C. Harvey.—This trustee has no right to retain anything out of equitable assets until the other creditors have been put on an equality with him. These are clearly equitable assets. *Lovegrove v. Cooper*, 2 Sm. & Giff 271, has often been commented upon as not being consistent with other authorities. They referred to *Silk v. Prime*, 1 Bro. C. C. 188; 2 L. C. in Eq. 123; *Cook v. Gregson*, 4 W. R. 581, 3 Drew. 647; *Wms. on Exrs.* 1555.

E. K. Karslake, Q. C., and Freeman.—*Hall v. Macdonald*, 14 Sim. 1, is an authority precisely in point. *Lovegrove v. Cooper (ubi sup.)* is perfectly good law. These assets are not equitable. The devisee in trust for sale cannot proceed against himself to have the property administered in a court of equity; he should proceed to sell and then satisfy his own debt.

Dickinson, Q. C., in reply.

WICKENS, V. C.—This case is one of some importance. There is a difficulty created by the case of *Hall v. Macdonald*, but I am bound to say that for a great many years I have thought that case was not law. I remember making a note against the case when it was first reported. I have no doubt whatever that the Vice-Chancellor Shadwell's decision was right, but I cannot help thinking that Mr. Simons has misconceived what was precisely the point of the case, and, in fact, he did not report the case for that point. It is mentioned incidentally, and I can easily conceive certain states of circumstances in which the decision would have been perfectly right, without that precise expression having been necessary, or having been used.

It seems to me that the case, in fact, is settled by principle, and the principle is so well established that I may venture to depart even from so great an authority as the Vice-Chancellor Shadwell in that case. There is no doubt as to the right of retainer as against legal assets on the part of an executor; and there is also, I think, such a preponderance of authority in favor of holding that assets like these are equitable; that, notwithstanding the decision in *Lovegrove v. Cooper*. I may so hold them.

The right of the heir under the statute is anomalous; I believe myself that that cannot be recon-

oiled with the principles of equity, but that it must be rested entirely upon decision, and upon the words of the statute. But I take it to be perfectly well settled that a trustee for sale who is not executor, has no right whatever analogous to a creditor. I take it as perfectly well settled that, if an estate is devised to a trustee for sale, or if it is conveyed to a trustee for sale for the purpose of paying debts, in neither case would there be any right analogous to the right of retainer. That being so, is it possible to say that the characters of trustee for sale and executor becoming united in one and the same person shall give to the trustee rights in his character of executor which in his character of trustee *per se* he could not have had? There would be a want of symmetry in that which almost makes it conclusive that it could not be the case.

Of course one might put cases which would lead to results more or less absurd; for instance, one might obviously put the case of an executor, who was not an original trustee, but a derivative trustee, as for instance an executor who was appointed trustee under a power before the sale; or you might put the case of a trustee for sale, who became personal representative, not having been so appointed, but by being executor of the original executor.

I do not see where you are to stop if you once say that the union of the two distinct offices of executor and trustee in the same person gives to the trustee rights analogous to those he would have as executor, but which he would in no way have as being merely trustee. Therefore I think the true view is to hold, as against assets like these, that his rights are precisely the same, whether he is executor *plus* trustee or not, and that therefore he has no right of retainer. The consequence will be, I take it, according to Mr. Dickinson's statement; that is to say, that equality must be established with respect to the equitable assets by paying the other creditors up to an equality with this executor, and then there will be a rateable distribution.

FAZAKERLEY V. CULSHAW.

Trustee—Real estate—Power to apply rents in repairing—Power to borrow.

A testatrix devised all her real estate to trustees upon certain trusts, and empowered them to lay out the rents thereof in repairing a certain dwelling-house (part of the real estate), and in erecting and making such alterations and additions thereto as they might think fit.

Held, that the trustees had no power to borrow money for repairing the house, and consequently that they should not be allowed interest on a sum which they had borrowed for that purpose.

[24 L. T. Rep. N. S. 773.]

This was an administration suit.

By her will, dated the 7th June, 1854, Agnes Culshaw, widow, gave and devised all her messuages, lands, tenements and hereditaments, situate and being in Ormskirk, in the county of Lancaster, and all other her real estate whatsoever, to Robert Neilson, his heirs and assigns, upon trust from time to time to pay the rents and profits thereof unto and equally amongst her grandchildren, Ellen Elizabeth Culshaw, Margaret Culshaw, Sarah Culshaw, and John Culshaw, as tenants in common during their respective lives, with divers remainders over for the benefit of the children and issue of all her said grandchildren.

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By a codicil to her will, dated the 16th July, 1855, the testatrix appointed John Fazakerley a trustee and executor of her will, along with Robert Neilson; and she thereby authorised her trustees and executors to lay out all or any part of her personal estate (which by her will she had given upon trust for her four grandchildren on attaining twenty-one, in equal shares), and the rents of her real estate, in repairing the dwelling-house and premises where she then lived, and in erecting and making such alterations and additions thereto as might from time to time appear necessary to them for letting the same to advantage.

The testatrix died on the 21st July, 1855, and her will and codicil were, in the following October, duly proved by John Fazakerley alone.

The four grandchildren were all infants at the death of the testatrix.

The dwelling-house and premises referred to in the codicil consisted of a dwelling-house known as Vine Cottage, and three small plots of land adjoining it, and situate in Buscough-street, Ormskirk. At the date of the testatrix's death, Vine Cottage was in a very dilapidated condition; and Fazakerley, not having in his hands sufficient money belonging to the testatrix to put the cottage into a thorough state of repair, borrowed sums amounting in the whole to 1,018*l.* 15*s.* 4*d.*, which he expended upon the repair of the premises, whereby he alleged that he had increased the letting value thereof from 25*l.* to 90*l.* He had since paid off the amount out of the rents.

Ellen Elizabeth Culeshaw, who attained twenty-one in September, 1869, having expressed herself dissatisfied with the expenditure of the sum of 1,018*l.* 15*s.* 4*d.* upon the repairs of the premises, Fazakerley instituted the present suit, praying for the administration of the real and personal estate of the testatrix, and for a declaration that the expenditure of the sum in question on the repairs of the premises was proper and for the benefit of the grandchildren, and that he might be allowed the sum of 1,018*l.* 15*s.* 4*d.* and interest as a proper disbursement on account of the real and personal estate of the testatrix, in taking the accounts.

Jessel, Q. C., and A. E. Miller, for the plaintiff, contended that he ought to be allowed all sums properly expended by him, with interest at the usual rate.

Southgate, Q. C., and Bedwell, for the grandchildren, contended that the plaintiff was not entitled to be allowed interest. There ought to be an inquiry as to the amount properly expended, and the plaintiff ought to pay the costs of the inquiry, as in *Re Churchill* (8 Jur. 719), where Lord Cottenham held that the committee of a lunatic, who had expended money in the repair of his estates without having the previous sanction of the court, must bear the costs of a reference to the Master whether the amount had been properly expended. They also referred to *Bridge v. Brown* (2 Y. & C. C. C. 181).

Bedwell for the other trustees.

Jessel, Q. C. replied.

Lord ROMILLY said that under the words of the codicil there was no power to raise money by mortgage of the real estate for the purpose of repairing; the trustees were only empowered to

apply for that purpose the rents after they received them, and therefore no interest could be allowed to the plaintiff in respect of the money which he had borrowed for the purpose of repairing the cottage. There must be an inquiry what sum was properly expended by the plaintiff in the repair of the cottage.

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SUPREME JUDICIAL COURT OF MAINE.

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HENRY BAKER V. SAME.

The fact that, when a resident of a city was injured by a defective way, which the city was bound to keep in repair, he was driving at a "faster rate than six miles an hour," in violation of a city ordinance, is no bar to his right to recover damages for such injury, if such driving did not in any way contribute to produce it. The fact that the jury failed to agree upon the answer to the question whether the plaintiff was driving at a faster rate than six miles an hour, does not render it reasonably certain that a general verdict for the plaintiff, in such action, is erroneous.

This was an action on the case, for an injury occasioned by a defective highway. The plaintiffs suffered serious damage in person and property on the evening of October 18th, 1868, by reason of the upsetting of the carriage in which they were riding, in consequence of running over certain piles of stones which had been dumped in the roadway on Cumberland street, by persons in the employ of the street commissioner, and left there over night, without guards or lights, to protect or warn the traveller. The buggy and harness were well made and in good order, the horse well broken and kind, though spirited, the street much frequented, and the evening too dark for a man in a carriage to see obstacles of that description on the ground.

H. Baker testified that he was driving not over five miles an hour, when the accident occurred. The defendants offered evidence to show that he was driving at a rate exceeding six miles an hour.

There was a city ordinance prohibiting driving at a faster rate than six miles an hour, under a penalty of not less than \$5 nor more than \$20.

The presiding judge instructed the jury, that if plaintiffs were driving at a faster rate than six miles an hour, when thrown from the carriage, yet if such driving did not in any degree contribute to produce the injuries complained of, would be no bar to their right to recover.

The case now came before this court on exceptions by defendants to this instruction, and also on motion to set aside the verdict (which was for the plaintiffs) as against law and evidence.

Davis & Drummond for plaintiffs.

J. W. Symonds, City Solicitor, for defendants.

The opinion of the court was delivered by

BARNES, J.—Counsel for the defendants cite a strong line of cases, in which our own and other courts have held city ordinances of this and like character, as binding on all who have actual or constructive knowledge of their existence, and as having the force of statute law within the limits to which they apply. And also cases in which it appears to have been held with more or less distinctness, that a party

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seeking a remedy in damages against a town or city or other corporation, charged with the maintenance of a way or bridge, is not entitled to recover, if at the time of the accident, the party plaintiff was violating a law of which he was bound to take notice.

But in all this latter class of cases, it will be seen upon examination that the wrongful act of the plaintiffs either was or was not assumed to be, in some manner or degree, contributory to the production of the injury complained of, so that the precise question here presented was not under consideration in any of them. They cannot be deemed authorities adverse to the instruction here given, if the point was not raised or considered. Thus in *Heland v. Lowell*, 8 Allen 407, it seems to have been taken for granted on all hands, that the plaintiff's want of care, evinced in the violation of the city ordinance, was one of the efficient causes of the accident. There may have been something in the evidence which made it certain that it was so, in which case it would be useless to raise or discuss the question which we are to pass upon. At all events the point was not taken, and the questions presented to the court were whether the plaintiff was bound by the ordinance, if it was not made to appear that he knew of its existence, and whether evidence of his general good character for sobriety was admissible, to rebut the evidence offered in defence that he was intoxicated when the accident occurred. The rulings complained of were the rejection of the evidence of general good character for sobriety, and the instruction, "that if the plaintiff at the time of receiving the accident was driving at a rate faster than a walk, in violation of the city ordinance, he could not recover, although he was using due care in other respects." It seems from the very tenor of the instruction, to have been conceded on the part of the plaintiff, that under the circumstances of that case, driving faster than a walk was not the "due care," which the plaintiff was bound to show he was using in all respects.

The court recite a dictum from *Worcester v. Essex Merrimac Bridge Corporation*, 7 Gray. 459, to the effect that if the plaintiff was, at the time of the accident, violating a public statute or a by-law, of which he had actual or constructive notice, he could not recover damages for the accident; but they immediately refer to the true principle, adding: "and it is the established law, that when a plaintiff's own unlawful act concurs in causing the damage that he complains of, he cannot recover compensation for such damage." It is very clear that the court could not have meant that a concurrence merely in point of time between a breach of law by the plaintiff and the accident, would bar the plaintiff to recover, because they had just said in *Alger v. Lowell*, 8 Allen 406, that "intoxicated persons are not removed from all protection of law; the plaintiff was bound to show that he was in the exercise of due care, and the jury were so instructed, if he used such care by himself or others, his intoxication had nothing to do with the accident; the city may be liable under some circumstances for an injury sustained by * * * an intoxicated person, if the condition of the injured person does not contribute in any degree to occasion the injury."

Now intoxication in the streets is a misdemeanor, upon which a penalty is imposed by law, as distinctly as it is by the city ordinance upon driving over a bridge faster than a walk, and it appears as likely to contribute to the occurrence of an accident, to say the least of it; yet no one would be likely to contend that a city or town would be relieved from the consequences of its negligence in the care of its ways, merely because the sufferer was intoxicated at the time of the accident, if it were made to appear that his breach of the law, in that respect, had nothing to do with its occurrence. It has been settled that intoxication is not conclusive evidence of a want of ordinary care: *Stuart v. Machias Port*, 48 Maine 477. In fine, recrimination is not a good plea in bar in actions of this kind, unless the plaintiff's claim originates in his offence, and he is obliged to prove the offence in order to establish his claim, or unless the commission of the offence has in some degree contributed to produce the injury, or necessarily negatives some point which the plaintiff is bound to establish in proof, in order to entitle him to a verdict.

The defendants' counsel contends that the simple fact that the plaintiff is in the act of violating the law, at the time of the injury, is a bar to the right of recovery. Undoubtedly there are many cases where the contemporaneous violation of the law by the plaintiff is so connected with his claim for damages, as to preclude his recovery; but to lay down such a rule as the counsel claims, and to disregard the distinction implied in the ruling of which he complains, would be productive oftentimes of palpable injustice. The fact that a party plaintiff in an action of this description was at the time of the injury passing another wayfarer on the wrong side of the street or without giving him half the road, or that he was travelling on runners without bells in contravention of the statute, or that he was smoking a cigar in the streets, in violation of a municipal ordinance, while it might subject the offender to a penalty, will not excuse the town for a neglect to make its ways safe and convenient for travelers, if the commission of the plaintiff's offence did not in any degree contribute to produce the injury of which he complains.

The soundness of the distinction recognised by the presiding judge in the instruction now under consideration, has been affirmed by this court in *Bigelow v. Reed*, 51 Maine 325, *Hamilton v. Goding*, 55 Maine 428, 429. See also *Moaton v. Gloster*, 46 Maine 520; *Davis v. Mann*, 10 M. & W. 548.

But the defendants' counsel insists that "the finding by the jury, that the illegal driving did not contribute to the injury, was unwarranted by the testimony," and argues that a change in the rate of speed must necessarily increase or diminish the danger, while "the verdict practically holds that the danger would be the same at a rate of less than six miles, as it would be at a rate of more than six miles an hour," inasmuch as the jury declared themselves as unable to agree whether the plaintiff was driving at the rate of more than six miles. It is reasonably certain, then, that the verdict must have been erroneous, because the jury failed to agree upon the answer to the question, whether the plaintiff was driving at a rate exceeding six miles an hour.

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Suppose half the jury thought the plaintiff was driving at the rate of six miles and an eighth per hour, and the other half thought his speed did not exceed six miles. They would not agree upon the special finding; but would that prevent them from finding that the rate of speed, whichever of the two rates it was, did not contribute to produce the injury? Might they not well have found upon the testimony here presented, that if the plaintiff was driving at a rate not exceeding five miles an hour, as he testified, the same results, to wit, the frightening the horse, his starting to run, and the upsetting of the carriage would have followed? If so, did it really make any difference as to the issue then on trial if he was going more than six miles an hour? We think the answers to these questions must demonstrate the injustice of making such a test decisive of the plaintiff's right to recover. The true question was (on this part of the case) whether he was using due and reasonable care under all the circumstances, or whether a want of such care on his part contributed to produce the injury.

We have no reason to doubt that this question was submitted to the jury, in a manner calculated to give to the testimony offered by the defendants as to the plaintiff's rate of speed, all its legitimate effect, or that it was passed upon by them in a manner which must preclude our interference with the conclusion at which they arrived. In each case the entry must be

Motion and exceptions overruled.

NOTE BY THE EDITOR OF THE "AMERICAN LAW REGISTER."

The cases are probably not altogether harmonious in regard to the effect of illegality in a contract or business, upon the right to recover upon any matter merely incidental to the main contract or business. It seems well agreed, that if the action is based upon any matter which is in violation of law, whether it be also *contra bonos mores* or not, it cannot be maintained. There was formerly an attempt to distinguish, in this respect, between *mala prohibita* and *mala in se*, as if contracts against positive law merely, were not to be held illegal to the same extent as if they involved also positive moral turpitude. There seems to have been an opinion somewhat extensively prevalent among men of the better class in our country, that if one peaceably submitted to endure the penalty of a statute, he had answered all the law required of him, and that he thereby obtained full pardon and absolution for his violation of the law. For instance, if in his conscience he felt the law to be in conflict with any higher law, as the constitution of the state, or the Divine law, he was at full liberty to act upon his own impulses, or convictions, and incurred no moral guilt provided he submitted to pay or endure the penalty.

Upon a somewhat similar view, it seems, at one time, to have been considered that Sunday laws, or those requiring abstinence from ordinary secular labor on the Lord's Day, did not render contracts made in violation of the statute void, but only exposed the parties to the penalty of the statute: *Geer v. Putnam*, 10 Mass 312; 2 Parsons on Cont. 762. But later cases have placed the question upon the true ground, that

the effect of the statute must be to render all acts done in violation of the statute void for all purposes, so that no action could be maintained upon any contract made in violation of these statutes: *Lyon v. Strong*, 6 Vt. 219; *Robeson v. French*, 12 Met. 24; *Gregg v. Wyman*, 4 Cush. 322. And the same rule has been extended to sales of property in violation of statutory regulations as to inspection, license, and stamping. As in actions for the recovery of the price of lottery tickets sold in violation of statutes: *Hunt v. Knickerbacker*, 5 Johns. 327; or for the enforcement of contracts for the sale of lands where a penalty was inflicted by statute; *Mitchell v. Smith*, 1 Binn. 110; or where the statute prohibited, under a penalty, the selling of shingles unless of a particular dimension or if not surveyed, and the action was for the recovery of the price of shingles sold in violation of the statute; *Wheeler v. Russell*, 17 Mass. 258. Cases of this character are very numerous in the reports, and not be discussed.

It seems, however, in all this class of cases to be considered, that in order to defeat the action, it must appear that it is some way founded upon, or in furtherance of, the illegality. Thus, a contract founded upon the consideration of future cohabitation is held void, as being against public morals: *Walker v. Perkins*, 3 Burr. 1568; s. o. 1 Wm. Bl. 517. But contracts founded upon past illicit cohabitation, even where one of the parties is married, have been upheld: *Turner v. Vaughan*, 2 Will. 339; *Walker v. Perkins*, *supra*; *Hill v. Spencer*, Amb. 611; *Kaye v. Moore*, 2 Sim. & Sta. 260; *Nye v. Moreley*, 6 B. & C. 133.

But where a party contributes to the maintenance of anything prohibited by law, or against the policy of the law, as where one lets lodgings to an immodest woman to enable her to carry on illicit cohabitation there, with different men, he cannot recover the rent. But if the woman merely lodge there and receives her visitors elsewhere, it is here said he may recover the rent: *Appleton v. Campbell*, 2 C. & P. 347. So, also, he cannot recover in such case, although at the time of letting the plaintiff did not know of the use to which the tenant purposed to put the lodgings, if he suffers her to occupy them after he learns the use: *Jennings v. Throgmorton*, R. & M. 251; *Lloyd v. Johnston*, 1 B. & P. 340. And it seems to have been held, that one may recover for getting up an expensive dress to be worn by a woman of bad fame, at public places, in furtherance of her vicious mode of life, even when the plaintiff knew the use for which it was intended beforehand: *Lloyd v. Johnston*, 1 B. & P. 340. But we should have doubted the entire soundness of the last case on this point. And Lord Ellenborough seems to have held, in *Bowry v. Bennett*, 1 Cowp. 348, that in such case the plaintiff cannot recover, where the work is done to forward prostitution, and to be paid out of the avails of such a course of life. And it has been held, that where houses have been leased for brothels, the lessor knowing the use contemplated, no recovery could be had upon the covenants in the lease: *Smith v. White*, Law Rep. 1 Eq. 626. And although, as stated above, at one time it seems to have been held that the plaintiff must expect to derive some advantage from the illegality, in order to defeat the action, that is

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not now held important: *Pearce v. Brooks*, Law Rep. 1 Exch. 218.

Anything done in furtherance of a business carried on in violation of law, can never be made the foundation of an action. As where the action was for services rendered in peddling goods for another, without license as required by law: *Stewartson v. Lothrop*, 12 Gray, 52. Nor is the agent of another, in performing an illegal act, liable to an action at the suit of his principal, for damages recovered against him on account of the negligence of the agent: *Baynard v. Harrity*, 1 Houston 200. But it would be otherwise if the business had been rendered illegal by the omission of the agent to obtain the proper license, which his principal confided in him to do: *Id.* And a woman cannot recover upon an implied contract for services performed by her as servant for a man with whom she lived as a mistress: *Walraven v. Jones*, *Id.* 855.

And it has been held that one who is travelling upon the highway on Sunday in violation of the statute cannot recover of the town for damages suffered by defects therein; *Bosworth v. Swansey*, 10 Met. 363. And if the plaintiff seeks to recover upon the ground that his travelling was a work of necessity or charity, and not of a secular character, so as to come within the statute, the burden of proof is upon him: *Id.*; *Jones v. Andover*, 10 Allen, 18. Chief Justice Shaw, in *Bosworth v. Swansey*, treats the question, as being whether the illegal act contributed to the injury. Upon this view, the decision of the principal case would be free from all difficulty, provided the question how far the violation of the city ordinance contributed to the injury, is properly one for the jury. In the case of travelling on Sunday in violation of the statute, it clearly could not be regarded as a proper question to be submitted to the jury, whether the illegal act contributed to the injury. That must be regarded as one of those self-evident propositions to be ruled by the court. In New Hampshire it seems to have been doubted how far the fact that the plaintiff was travelling in violation of the statute will preclude a recovery in such cases: *Corry v. Bath*, 35 N. H. 533. And in *Norris v. Litchfield*, 35 N. H. 271, Bell, J., is reported to have said, "as a general principle it is wholly immaterial whether the plaintiff was acting in violation of law, unless his wrong-doing has directly contributed to his damage." These dicta seem to justify the decision in the principal case. And there are many cases where the plaintiff's illegal act must be considered as having contributed to his injury, where he is not precluded from recovery on that account. As where one is injured by spring-guns set by the owner upon his premises for the protection of his property, while the plaintiff is trespassing thereon: *Bird v. Holbrook*, 4 Bing. 628; s. c. 15 Eng. C. L. Rep. 91. There is no end to the cases bearing more or less directly upon the question decided in the principal case. The only question, which it seems to us could fairly arise in the case, is how far the plaintiff is competent to use the highways of a town or city differently from the way the law allows him to use them at all, and then claim damages because they are not in complete repair, and ask to have the jury decide, by way of inference merely—since, from the nature of the case, there could be no direct

evidence to the point—whether his acknowledged abuse of his legal license to use the highway in a particular manner, had any tendency, or contributed in any degree, to produce or increase the injury. It requires no gift of prophecy to foretell how such questions are likely to be decided by the jury. The present case well illustrates that point. The jury were ready to say that the rate of speed had no connection with the injury: but they could not agree what the rate of speed was, whether more or less than the law required. And as the case now stands upon the record, the plaintiff was using the highway in an illegal manner; but not so as to contribute to his injury, in the opinion of the jury. The only doubt, as we have said, would seem to be, whether the jury, by a mere inference, can purge the plaintiff from the ordinary consequences of his illegal act, that is to increase the peril of travelling as the speed increases, or whether the defendant is fairly entitled to have the benefit of this natural presumption, as one of the presumptions which the law denominates *presumptiones juris et de jure*. The case is somewhat novel, and as it seems to us, is presented by the learned judge with great fairness and ability.

IMPORTANT IF TRUE.—The *American Society* newspaper has a recent article, making the following announcements: First, that an eminent lawyer says that all marriages celebrated on Sunday are void, because marriage is a civil contract, and civil contracts made on Sunday are void; second, that the children of a deceased millionaire are going, for this reason, to contest their father's will, by which he gives his estate to his children by a second wife, to whom he was married on Sunday; and thirdly, that a learned judge has lately decided that marriages between minors, or between an adult and a minor, are void. Now, people should avoid great excitement in warm weather, and although, of course, no lawyer needs to be told any thing about the law in question, yet, to relieve the minds of the laymen and lay-ladies who form and read our foolish "*American Society*," we will state, as gravely as we can, that there is no cause for alarm, at least, to the ladies. The marriages are all valid, everywhere. Even in this State, although marriage is held to be a civil contract, yet civil contracts made for a lawful purpose, and not tending to disturb the public peace and quiet, are valid and enforceable, although made on Sunday. Now, unless it can be made out that marriage is a contract tending to disturb the public peace and quiet, we see no trouble. Some marriages do have that tendency, undoubtedly, and we advise the female parties thereto to look out for themselves. As to the millionaire, we fancy his will must stand; he might have given his estate to Tom, Dick and Harry, who are not his children at all, even by a Sunday marriage, and they would take it in spite of the children by the week-day marriage. As to marriages of minors, in every community the lawful age at which marriage may be contracted is fixed below the age of majority; in this State it is fourteen for men and twelve for women, the latter being so much smarter, and, we may add, more impatient.—*Albany Law Jour.*

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DIGEST.

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FOR FEBRUARY, MARCH AND APRIL.

(Continued from page 171.)

ACCOUNT.

An Act of Parliament provided that, if the income of the defendants, from rates, duties, &c., received, should fall below £1000, the plaintiff should make up the deficiency. There was a deficiency in every year from 1847 to 1858, but no demand was made till 1870; an action at law was then brought to recover it. The plaintiff filed the bill for discovery of the rates, &c., received, and which ought to have been received, and for an injunction against the action at law. *Held*, that the injunction should be granted until the hearing.—*Southampton Dock Co. v. Southampton Harbour and Pier Board*, L. R. 11 Eq. 254.

ACTION.

The plaintiff apprenticed his son to a jeweller for six years, and covenanted to pay him £25 premium, which he paid. At the end of the first year the jeweller died. *Held*, that the plaintiff could recover no part of the premium from the executor.—*Whincup v. Hughes*, L. R. 6 C. P. 78.

See PAYMENT.

ADEMPTION.—See LEGACY.

ANSWER.—See EQUITY PLEADING AND PRACTICE, 2. APPOINTMENT.

There was a trust in a marriage settlement for such of the children of the marriage as the husband should appoint. He appointed a sum to a married daughter for her separate use, without power of anticipation. *Held*, that the appointment was valid, but the restraint on alienation void.—*In re Cunynghame's Settlement*, L. R. 11 Eq. 324.

See SETTLEMENT; WILL, 12.

ASSIGNMENT.

A trader assigned all his property to the defendant as security for an existing debt, and money advanced to pay the debt of another creditor who had a valid mortgage upon the same property. The trader afterwards was adjudged bankrupt on his own petition. *Held*, that the assignment was valid, and not an act of bankruptcy.—*Lomax v. Buxton*, L. R. 6 C. P. 107.

See BANKRUPTCY; BOND.

BANKRUPTCY.

R. assigned all his property to the plaintiff in consideration of a pre-existing debt, and under a threat of legal proceedings; R. did

not then contemplate bankruptcy, but was hopelessly insolvent; and was afterwards adjudged bankrupt on his own petition. *Held*, that the assignment being made under pressure was valid; and that although an act of bankruptcy, yet there was no relation back to it, the adjudication being on R.'s own petition.—*Jones v. Harber*, L. R. 6 Q. B. 77.

See ASSIGNMENT.

BOND.

Two bonds were given by a company to H., who assigned them to the holder for value; the interest was once paid by the company upon a judgment obtained in a suit therefor; the holder also recovered judgment in another suit for the principal and interest subsequently accrued. *Held*, that the holder was entitled to prove on the bonds against the company free from equities between it and H.—*Ex parte Chorley*, L. R. 11 Eq. 157.

BUILDING CONTRACT.

A contractor agreed by a specified time to do certain work according to specifications, subject to certain alterations and additions; and to forfeit £3 for every day after that time until completion; and also, that the time for completing any alterations or additions should not exceed the specified period unless an extension were allowed by the clerk of the works. The contractor did not complete within the period, but failed to do so on account of alterations ordered. No extension of time had been allowed. *Held*, that the contractor had subjected himself to the forfeiture.—*Jones v. St. John's College*, L. R. 6 Q. B. 115.

BURDEN OF PROOF.—See EVIDENCE.

CARRIAGE.

A passenger by a railway had his portmanteau put into the same carriage with him; at a station he got out for ten minutes, and on his return failed to find the carriage, and completed his journey in another; the portmanteau when found had been robbed. The jury found that his negligence had contributed to his loss. *Held*, that the general liability of the company was modified by the implied condition that the passenger should use reasonable care.—*Talley v. Great Western Railway Co.*, L. R. 6 C. P. 44; s. c. in Appeal, 7 C. L. J. N. S. 20.

CHARGE.—See EQUITY, 2.

COMPANY.

1. A shareholder gave to the company in payment for his shares confederate bonds at their market value, which payment was agreed to by the company. *Held*, that this was a valid payment and could not be impeached afterwards.—*Schroder's case*, L. R. 11 Eq. 181.

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2. The W. Assurance Society transferred to the A. Company its business and assets, including a lease to a trustee for them, and policies of reinsurance, and the A. company agreed to indemnify the W. shareholders against all claims. The A. company was afterwards wound up, and the W. shareholders claimed the lease and policies of reinsurance. *Held*, that the W. Society had no lien on the lease nor the policies, either as surety or as unpaid vendors. *Ex parte Western Life Assurance Society*, L. R. 11 Eq. 164.

See BOND.

CONDITION.—*See* VENDOR AND PURCHASER, 1.

CONFEDERATE BONDS.—*See* COMPANY, 1.

CONFLICT OF LAWS.—*See* FOREIGN JUDGMENT.

CONSTRUCTION.—*See* VENDOR AND PURCHASER, 2; WILL, 1-10.

CONTRACT.

1. The plaintiff agreed to hire grass-land of the defendant on the terms of a lease to be signed afterwards. He entered and found the land overrun with rabbits. When the lease was presented to him he refused to sign it, unless the defendant undertook to destroy them. The defendant promised to do so, and the plaintiff signed the lease in its original form. The defendant did not destroy the rabbits. *Held*, that the promise was collateral to the lease and founded on a good consideration.—*Morgan v. Griffith*, L. R. 6 Ex. 70.

2. R. applied in writing for thirty shares in a company; they were allotted to him and notices of the allotment were posted to his address, but he denied that he had ever received them. *Held*, that the evidence was insufficient to prove notice.—*Reidpath's case*, L. R. 11 Eq. 86.

3. The defendant applied by letter to the plaintiffs for fifty shares; on the next day they were allotted to him, and notice thereof posted to his address, but he never received the notice. *Held*, that he was not a shareholder.—*British and American Telegraph Co. v. Colson*, L. R. 6 Ex. 108.

4. By the rules of the Stock Exchange a jobber buying shares is bound by a certain day to pass to the seller the name of a person willing to take them as the ultimate purchaser; the seller may object to the name, and the jobber is liable for the shares until a satisfactory name is given. The plaintiff through his brokers sold shares to the defendant, a jobber; they were subsequently bought by other brokers for S., who procured G., a person of no means, to take a transfer of the shares, and G.'s name was passed to the defendant, and by him to

the plaintiff's brokers, who prepared the transfer to G., and the plaintiff executed it. Calls were afterwards made, which the plaintiff was obliged to pay. *Held*, (Lush, J., dissenting), that the defendant was not liable to indemnify him against the calls.—*Maxted v. Paine*, (Second Action), L. R. 6 Ex. (Ex. Ch.) 132; *a. c. L. R. 4 Ex. 208*; 4 Am. Law Rev. 112.

See ACTION; BUILDING CONTRACT; COMPANY, 2; VENDOR AND PURCHASER, 1.

CONVERSION.—*See* DAMAGES, 2; WILL, 2.

COSTS.—*See* EQUITY PLEADING AND PRACTICE, 1.

COVENANT.—*See* SETTLEMENT; VENDOR AND PURCHASER, 2.

CRIMINAL LAW.

1. The prisoners indecently exposed their persons in a urinal which was on a public foot-path in Hyde Park, and open to the public. *Held*, that the jury rightly found that the urinal was a public place.—*Reg. v. Harris*, L. R. 1 C. C. 232.

2. Indictment that the prisoner "knowingly and without lawful excuse feloniously" had in his possession a die impressed with the resemblance of a sovereign. He ordered two dies of a maker, who communicated with the mint and received permission to let the prisoner have them, which he did. *Held*, that there was no evidence of lawful excuse, and that the prisoner's intention had nothing to do with the offence.—*Reg. v. Harvey*, L. R. 1 C. C. 284.

3. It was the prisoner's duty as servant of H. to pay his workmen; by fraudulent representations of the amount due he obtained from his master's cashier 2s. 4d. more than was really due, and appropriated it to his own use. *Held*, that the money delivered to the prisoner was in the constructive possession of his master, and that the misappropriation of it was larceny.—*Reg. v. Cooke*, L. R. 1 C. C. 295.

4. The prisoner induced A. to purchase a chain from him by a statement that it was fifteen carat gold, knowing that the statement was untrue. *Held*, that a conviction for obtaining money on false pretences was good.—*Reg. v. Ardley*, L. R. 1 C. C. 301.

See STATUTE.

DAMAGES.

1. The defendants in working their coal mine passed their boundary, and took coal from the plaintiff's mine. *Held*, that the measure of damages was the value of the coal at the mouth of the pit, making allowance for the cost of raising it, but not for the cost of severing it.—*Llynvi Co. v. Brogden*, L. R. 11 Eq. 188.

2. Trover. The plaintiff bought of the de-

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fendant one hundred cases of champagne at 14s. a dozen, and immediately resold them to A. at 24s. a dozen. The defendant refused to deliver them; and as other champagne of the same quality could not be obtained, the plaintiff did not perform his contract with A. The defendant had no notice of the special circumstances. *Held*, that the champagne had acquired a special value of 24s., which was the measure of damages.—*France v. Gaudet*, L. R. 6 Q. B. 199.

See NEGLIGENCE, 1.

DEATH.—*See EVIDENCE*.

DEPOSIT.—*See VENDOR AND PURCHASER*, 3.

DISCOVERY.—*See ACCOUNT*; **EQUITY PLEADING AND PRACTICE**, 2.

EASEMENT.

A natural stream flowed through two adjoining pieces of land, A. and B., owned by the same person; in 1860, there was a tank in B. into which the water flowed, and two pipes conducted it from the tank to cattle-sheds in A.; the water thus obtained was purer than that taken from the stream in A. In 1868, A. was conveyed to the plaintiff with all waters, water-courses, rights, privileges, advantages, and appurtenances to the same belonging, or with the same or any part thereof, held, used, enjoyed, or reputed as part thereof or appurtenant thereto; B. was conveyed to the defendant, who stopped the pipes; the cattle-sheds had been removed, and cottages built in their place, and the water used for domestic purposes. *Held*, that the right to the use of the pipes was continuous and passed to the plaintiff by implication; also, that it was a watercourse which passed by the words of the conveyance; also, that it was necessary for the use of A.; also, that when the water arrived at his premises the plaintiff could do what he liked with it.—*Watts v. Kelson*, L. R. 6 Ch. 166.

EQUITY.

1. A bill alleged that the plaintiff had been induced by the fraudulent representations of the defendants to pay money for shares in a company, and sought to make them liable for it. A demurrer to the bill was overruled.—*Hill v. Lane*, L. R. 11 Eq. 215.

2. The defendant, while A. was in great necessity, discounted his acceptance for him at an unconscionable rate, and A. charged the debt upon his revisionary property. *Held*, that the charge should stand as security only for the money actually advanced and interest.—*Tyler v. Yates*, L. R. 11 Eq. 295.

3. C. granted an annuity out of land, and to

secure it granted a term of one hundred years in the land to a trustee; the legal estate was then outstanding in mortgagees. C. by his will devised the land to his sons; they paid off the mortgages, and had the legal estate conveyed to the uses of the will, and then sold it to G. without notice of the annuity. *Held*, that the annuitant had no remedy in equity against the trustee and purchaser, the only question being one of estoppel. *Semble*, that there was no estoppel.—*Clemow v. Geach*, L. R. 6 Ch. 147.

See ACCOUNT; **BOND**; **INJUNCTION**.

EQUITY PLEADING AND PRACTICE.

1. A petition was served on a respondent, whom it was necessary to serve, but who had no interest in the subject-matter of the petition. *Held*, that the petitioner should have tendered the respondent a sum sufficient to enable him to consult a solicitor, and that as he had not done so, the respondent was entitled to costs for appearing.—*Wood v. Boucher*, L. R. 6 Ch. 77.

2. A policy issued in 1862 by the defendants upon the plaintiff's life contained a condition that it should be void if he went out of Europe without permission to be obtained on paying an extra premium. He went to India about the same time, but paid the ordinary premiums until 1868, when, he failing to pay, the company refused to reinstate the policy except on the payment of the India premium from its date. It contained a provision for reinstating on payment of the premium with interest. A bill was filed on the ground that the company knowing of his residence in India had not charged the extra rate, and that the policy should be reinstated upon payment of the ordinary premium; an interrogatory asked whether, in respect of the twenty policies granted by the defendant to persons going to India about the same time as the plaintiff's policy, any extra payments were made. *Held*, that the plaintiff was entitled to the discovery.—*Girdlestone v. North British Mercantile Insurance Co.*, L. R. 11 Eq. 197.

3. H. was one of the trustees of the real estate of a bank. The deed of settlement provided that the directors should order any action or proceeding to be brought or defended on account of the property of the bank. A suit was brought against the trustees for this property, and the solicitors of the bank entered an appearance for all the trustees. H. moved to have his appearance expunged as entered without his authority. *Held*, that the appearance was rightly entered.—*Heinrich v. Sutton*, L. R. 6 Ch. 220.

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ESTOPPEL.—See BOND; EQUITY, 8.

EVIDENCE.

L. died in 1860, and by his will gave a legacy to T., who had sailed to Australia and was heard from in 1859, but never afterwards. More than seven years after, the residuary legatee petitioned for payment of the legacy to him. *Held*, that the burden was on those who claimed under T. to prove that he survived the testator.—*In re Leew's Trusts*, L. R. 11 Eq. 236.

See CONTRACT, 1-3; CRIMINAL LAW, 1.

EXECUTOR.—See WILL, 1, 2.

EXTINGUISHMENT.—See POWER.

FALSE IMPRISONMENT.—See MASTER AND SERVANT, 1.

FALSE PRETENCES.—See CRIMINAL LAW, 4, 5.

FOREIGN JUDGMENT.

1. Action upon a foreign judgment by a court having jurisdiction. The plea set out that the judgment proceeded upon a mistake in English law, and the mistake appeared on the record, the record also showed that the defendants did not bring to the knowledge of the foreign court the provision of English law. *Held*, that the mistake did not prevent the English Court from giving effect to the judgment.—*Goddard v. Gray*, L. R. 6 Q. B. 139.

2. By the law of France a resident may sue a foreigner not resident there; the mode of citation is by serving the summons on the Procureur Impérial. The defendants were sued and service made in this manner; they were not French subjects, nor resident in France, nor in France when the obligation upon which they were sued was contracted, but had notice of the suit. Judgment was given against them by default, and an action brought in England on the judgment. *Held*, that the defendants were under no obligation to obey the French judgment.—*Shibaby v. Westenholz*, L. R. 6 Q. B. 155.

FORFEITURE.—See BUILDING CONTRACT.

FRAUD.—See BANKRUPTCY; EQUITY, 1.

FRAUDULENT CONVEYANCES.—See ASSIGNMENT.

GIFT.—See CHARITY; WILL, 7.

HOTCH-POT.—See WILL, 5.

HUSBAND AND WIFE.

The defendant's wife, without his knowledge, bought of the plaintiff goods, such as a gold pencil-case, cigar-case, glove-box, scent-bottle, guitar, music, purse, and the like, to the value of £20. The defendant was a clerk, with a salary of £400 a year. *Held*, that the wife's authority to bind her husband extended only to contract for things suitable to his style of living so far as they were within the domestic

department, and that the defendant was not liable.—*Phillipson v. Hayter*, L. R. 6 C. P. 88.

INDECENT EXPOSURE.—See CRIMINAL LAW, 1.

INDEMNITY.—See CONTRACT, 4.

INJUNCTION.

An Act under which a railway was constructed enacted that the company should from time to time erect and maintain such works for drainage as should be directed by justices of the peace. *Held*, that the Court of Chancery could not exercise jurisdiction to restrain the company from flowing the adjoining lands by reason of insufficient drainage, the proper remedy being an application to the justices.—*Hood v. North Eastern Railway Co.*, L. R. 11 Eq. 116.

See VENDOR AND PURCHASER, 2.

INTENTION.—See CRIMINAL LAW, 2; WILL, 13.

INVESTMENT.—See WILL, 2.

INVITATION.—See NEGLIGENCE, 2.

JURISDICTION.—See EQUITY, 1, 3; FOREIGN JUDGMENT; INJUNCTION.

LARCENY.—See CRIMINAL LAW, 3.

LAPSE.—See EVIDENCE.

LEGACY.

Testator bequeathed to his wife £200 which he directed to be paid ten days after his decease. During his last illness he gave his wife £200 at her request to meet expenses immediate on his death. *Held*, that the legacy was not given for such a particular purpose that it was satisfied by the gift.—*Parkhurst v. Howell*, L. R. 6 Ch. 136.

LETTER.—See CONTRACT, 2, 3.

LICENSE.—See NEGLIGENCE, 2.

LIEN.—See COMPANY, 2.

MASTER AND SERVANT.

1. A clerk of a railway company gave the plaintiff into custody, upon a charge that he attempted to rob the till at a station, after the attempt had ceased. *Held*, that as the clerk was not acting in protection of the company's property, he had no implied authority to give the plaintiff into custody, and that the company were not liable for false imprisonment.—*Allen v. London and South Western Railway Co.*, L. R. 6 Q. B. 65.

2. At B. three railway stations are open to one another, and the whole area is used as common ground by the passengers of all. The plaintiff, on his way to the booking-office of another company, was standing on the defendants' platform waiting for luggage, when a porter of the defendants' drove a truck laden with luggage so negligently that a trunk fell off and injured the plaintiff. *Held*, that the defendants were liable for the misfeasance o

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their servant, although the plaintiff was not a passenger on their line.—*Tebbutt v. Bristol and Exeter Railway Co.*, L. R. 6 Q. B. 78.

8. Declaration by the administrator of W. that W. was employed by the defendants in cleaning a machine, that by the negligence of the defendants the machine was defectively constructed, as they knew, and that by reason the premises the machine was set in motion while W. was cleaning it and injured him. *Held*, on demurrer, that the declaration showed sufficiently that the injury was caused by the defendant's default, and that W. did not know the risk.—*Walling v. Oastler*, L. R. 6 Ex. 78.

See CRIMINAL LAW, 8.

MONEY HAD AND RECEIVED.—See ACTION; VENDOR AND PURCHASER, 8.

MORTGAGE.

In 1851, trustees advanced the trust funds on security of a mortgage, which recited that the money advanced was trust money. In 1856 the mortgagor gave another mortgage of part of the mortgaged property to other persons to secure an advance; and at the same time, to enable him to obtain the advance, the surviving trustee gave up the title deeds to the mortgagees (who had no notice of the former mortgage), and received from the mortgagor half the advance, and applied it to his own purposes. Just before the last mortgage the surviving trustee executed a reconveyance of this part of the property to the mortgagor, but the mortgagees had no knowledge of it. *Held*, that the second mortgagees could not claim the legal estate under the reconveyance without admitting that it gave them notice of the trust, and that the mortgage of 1851 had priority.

The mortgagor in 1861 executed a deed purporting to convey to the surviving trustee in fee another part of the mortgaged property, no mention being made of the mortgage; the trustee mortgaged this part for his own benefit, suppressing the mortgage of 1851. *Held*, that the mortgagees could not insist on any benefit from this breach of trust.—*Pitcher v. Rawlins*; *Joyce v. Rawlins*, L. R. 11 Ex. 58.

NECESSARIES.—See HUSBAND AND WIFE.

NEGLECT.

1. J. deposited certificates of railway shares with a banking company who collected dividends for a commission. They kept the certificates with their own securities in a box in the manager's room, of which he had the key. The manager sold the shares, and forged J.'s name to the transfer. The fraud being discovered, J. brought a suit against the holder of

the stock and the railway company, in which he obtained relief, but no costs. He then brought this claim against the bank for the amount of his costs. *Held*, that the bank was a bailee for reward, and had been guilty of negligence, but that the loss of the costs was not a natural or ordinary consequence of the neglect.—*Johnston's Claim*, L. R. 6 Ch. 212.

2. At a railway station it was the practice for the consignees of coal to assist in unloading, and for that purpose to go along a flagged path by the waggons; the plaintiff was a consignee, and with the permission of the station-master went to the waggon, and, as he descended to the path with some coal, a flag gave way and he was injured. *Held*, that the railway company was liable.—*Holmes v. North Eastern Railway Co.*, L. R. 6 Ex. (Ex. Ch.) 123; s. c. L. R. 4 Ex. 254; Am. Law Rev. 108.

See CARRIER; MASTER AND SERVANT, 2, 3.

NOTICE.—See CONTRACT, 2, 3; MORTGAGE.

NUISANCE.—See INJUNCTION; VENDOR AND PURCHASER, 2.

PASSENGER.—See CARRIER; MASTER AND SERVANT, 2.

PAYMENT.

The defendant was indebted to the plaintiff, and S. without the defendant's knowledge paid £60 in settlement to the plaintiff, who supposed that S. was acting as the defendant's agent. The plaintiff afterwards returned the £60 to S., and sued the defendant. *Held*, that as the defendant had not ratified the payment, it was competent for the plaintiff to return the money and maintain the action.—*Walter v. James*, L. R. 6 Ex. 124.

See COMPANY, 1.

PERFORMANCE.—See ACTION; BUILDING CONTRACT.

PERPETUITY.—See APPOINTMENT.

PLEADING.—See MASTER AND SERVANT, 3.

POWER.

Real estate was settled to the use of H. for life, remainder to uses in favor of H.'s children, with an ultimate limitation to the use of H. in fee, and the trustees were empowered to sell during the life of H. at his request. H. conveyed his estate to the plaintiff; afterwards the trustees at H.'s request and in execution of the power, sold and conveyed all the estate to the plaintiff. *Held*, that the power was not extinguished by the alienation of H.'s interest, as nothing was done in derogation of the estate of the alienee.—*Alexander v. Mills*, L. R. 6 Ch. 124.

See APPOINTMENT.

PRESUMPTION.—See EVIDENCE.

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PRINCIPAL AND AGENT.—*See* HUSBAND AND WIFE;
PAYMENT; RATIFICATION; TRUST.

PRIORITY.—*See* MORTGAGE.

PROBATE.—*See* WILL, 13, 14.

PROMISSORY NOTE.—*See* RATIFICATION.

PROXIMATE CAUSE.—*See* NEGLIGENCE, 1.

RAILWAY.—*See* CARRIER; INJUNCTION; MASTER
AND SERVANT, 1, 2; NEGLIGENCE, 2.

RATIFICATION.

Action upon a note purporting to be signed by the defendant and J. The defendant's name had been forged by J.; the plaintiff having threatened criminal proceedings against J., the defendant signed the following: "I hold myself responsible for a bill of £20 bearing my signature and J.'s," &c. *Held*, (MARTIN, B., dissenting) that the defendant was not liable on the note.—*Brook v. Hook*, L. R. 6 Ex 897; C. L. J. N. S. 158.

See PAYMENT.

REMOTENESS.—*See* APPOINTMENT.

REPRESENTATION.—*See* CRIMINAL LAW, 4.

REVOCATION.—*See* WILL, 13

SALE.—*See* CONTRACT, 4.

SALVAGE.

A steam-tug agreed to tow a vessel into Liverpool for £45; while she was doing so a heavy gale arose, and both ships were for a long time in great peril; but the master of the tug stayed by the vessel, and at last succeeded in towing her into port; the vessel would have been lost if the tug had left her. *Held*, that the tug was entitled to salvage.—*The I. C. Potter*, L. R. 8 A. & E. 292.

SATISFACTION.—*See* LEGACY.

SETTLEMENT.

By a marriage settlement it was agreed that, if during coverture the wife should become entitled to property of the value of £500 or upwards, it should be settled upon the same trusts. £5499 19s. 1d. were afterwards bequeathed upon trust as she should appoint, she appointed by each of eleven deeds dated on successive days, but some executed on the same day, £499 19s. 11d. for her own separate use. *Held*, that she was entitled to the whole fund as she had appointed.—*Bower v. Smith*, L. R. 11 Eq. 279.

SOLICITOR.—*See* EQUITY PLEADING AND PRACTICE, 8; TRUST.

SPECIFIC PERFORMANCE.—*See* VENDOR AND PURCHASER, 1.

SURETY.—*See* COMPANY, 2.

TITLE.—*See* POWER.

TOWAGE.—*See* SALVAGE.

TROVER.—*See* DAMAGES, 2.

TRUST.

Trustees advanced trust funds on security of a mortgage, but, by the negligence of their solicitor the existence of a prior mortgage was not discovered, which made the security insufficient. *Held*, that the trustees were answerable for the loss.—*Hopgood v. Parkin*, L. R. 11 Eq 74.

See EQUITY PLEADING AND PRACTICE, 8;
MORTGAGE; WILL, 2.

ULTRA VIRES.—*See* COMPANY, 1.

USAGE.—*See* CONTRACT, 4.

VALUE.—*See* DAMAGES.

VENDOR AND PURCHASER.

1. A contract of sale of land contained a condition that the vendors might rescind if any objection or requisition was persisted in, and another condition providing for compensation in case of any error or mistake in the description of the property or of the vendors' interest. An objection was made by the purchaser that the vendors were not entitled to certain minerals under the land, and compensation was claimed. The vendors contended that they had a good title, and, the purchaser persisting, they rescinded the contract. *Held*, that they were entitled to rescind, and the purchaser was refused specific performance.—*Mawson v. Fletcher*, L. R. 6 Ch. 91; s. c. L. R. 10 Eq. 212.

2. A. sold a piece of land to B., who covenanted not to "do or suffer to be done on" the premises "anything which shall be a nuisance" to any of the owners of the adjoining property. B. divided the land into thirty-four lots, and sold two to T., who covenanted not to do or suffer to be done on the granted premises any thing which should be a nuisance to A. "or any of the tenants, . . . for the time being, of the adjoining property." Other lots were sold to the plaintiffs. The successors of T. were about to use their lots for national schools. *Held*, that "the adjoining property" in T. covenant meant the property adjoining the lots conveyed to him, and the purchasers of other lots were entitled to the benefit of it, but that the establishment of a national school was not a legal "nuisance."—*Harrison v. Good*, L. R. 11 Eq. 838.

3. The plaintiff paid £80 deposit as part of the purchase-money for a lease of a tavern, the contract for which was preparing, and was to be signed when completed. A contract was tendered to him to sign which contained unusual and unreasonable stipulations, and he refused to sign it. *Held*, that he was entitled to recover the deposit.—*Mosses v. Wisker*, L. L. 6 C. P. 120.

See POWER.

DIGEST OF ENGLISH LAW REPORTS.

VENDOR'S LIEN.—*See COMPANY, 2.*

VOLUNTARY CONVEYANCE.—*See BANKRUPTCY.*

WATERCOURSE.—*See EASEMENT.*

WILL.

1. Bequest to testator's wife for life, and after her decease to all his brothers and sisters; namely, M., E., T., S., and F., equally; but in case any of them should die leaving issue, then the part or share of him, her, or them so dying, to his, her, and their respective issue. M. survived the testator, and died in the widow's lifetime leaving children; E. died in the testator's lifetime, leaving four children, all of whom survived the testator, and two survived the widow; T. and S. survived the testator and died in the widow's lifetime, T. without issue, and S. leaving one child, still living; F. died in the testator's lifetime, leaving children who survived him, some of whom died in the widow's lifetime leaving children, and others survived her. *Held*, that the shares of E. and F. (who predeceased the testator) went to their respective issue who were living at the testator's death; that T.'s share went to his personal representative; that the shares of M. and S. went to their respective issue living at their deaths.—*Hobgen v. Neale*, L. R. 11 Eq. 48.

2. Testator gave all his residuary estate to trustees upon trust to sell "so much and such part thereof as in their sole discretion they may think necessary for the purpose of paying" all his mortgage and other debts; and out of the proceeds to pay the same, and invest what remained after such payments, and hold it and the other residuary estate upon trust to pay the annual produce thereof to his three daughters for their lives. The residuary estate included certain leaseholds subject to a mortgage, which the trustees paid off. *Held*, that the trustees had the discretion to determine what part should be sold, and were not bound to convert the leaseholds, and that the tenants for life were entitled to the rents of the leaseholds in specie.—*In re Sewell's Estate*, L. R. 11 Eq. 80.

3. Testator devised lands "to all the children or legal issue" of his daughter A., to be divided between them equally after A.'s decease. She had ten children; one of them died before the testator without issue; three survived the testator, and died in A.'s lifetime, two without issue, one leaving children; the remaining six survived and had had children, and some of them grandchildren. *Held*, that "children or legal issue" meant that the children were to take; and where there were

not children their issue were to take; and that the children of A., who were living at the testator's death, and those who were born afterwards, took vested interests in fee.—*Holland v. Wood*, L. R. 11 Eq. 91.

4. Gift by will to "my great-nephew G., and to such other of my nephews and nieces as shall be living," &c. *Held*, that the great-nephews and great-nieces were entitled to share with the nephews and nieces.—*In re Blower's Trusts*, L. R. 11 Eq. 97.

5. Testator gave his property in trust for his nine children in equal shares, provided that if its value should amount to or exceed £40,000, then the share of each son should be one-twentieth more than the share of each daughter; he also directed that any sum which he was liable to pay to the trustees of the marriage settlement of one of his daughters should be taken in satisfaction *pro tanto* of her share, and should be brought into hotch-pot and accounted for accordingly. The value of the estate exceeded £40,000 if the sum payable to the trustees was included, but not otherwise. *Held*, that the sum payable to the trustees was to be treated as part of the estate.—*Fox v. Fox*, L. R. 11 Eq. 142.

6. Legacy in trust for R. "should he survive my sister E.; should he not survive her nor attain his twenty-first year, then over." *Held*, that the intention was clear to make the legacy absolute if he attained twenty-one.—*In re Thompson's Trusts*, L. R. 11 Eq. 146.

7. Bequest of personal property to be equally divided between the testator's two sisters; his sister A. to have immediate control of her share, and his sister S. upon attaining the age of twenty-five years, until which time it should be in trust for her; and in case of the death of either before the testator, or before marrying and having children, the whole to go to the survivor. A. was more than twenty-five at the testator's death; S. afterwards attained that age, but was unmarried. *Held*, that S. had an absolute interest in her share at twenty-five; and that the gift over was intended to take effect only in the event of death happening before that time.—*Clark v. Henry*, L. R. 11 Eq. 222.

8. Testator declared that "the income arising from my principal money shall be paid to my wife, while unmarried, for the support of herself and the education of my children; and at her death, or on her marriage, to be divided among them." He left but little cash, but had a large amount of personal property, leaseholds, and freeholds. *Held*, that all the per-

DIGEST OF ENGLISH LAW REPORTS.—REVIEWS.

sonal property and leaseholds passed by the bequests, but not the freeholds.—*Prichard v. Prichard*, L. R. 11 Eq. 282; 7 C.L.J. N.S. 105.

9. Testatrix gave certain pecuniary legacies and a house (which was leasehold), "and all the rest to be divided" between the daughters of A. *Held*, that "all the rest" included all the other property, real as well as personal.—*Attree v. Attree*, L. R. 11 Eq. 280; 7 C. L. J. N. S. 195.

10. Testator gave "all my furniture, &c., with my six freehold houses," to his wife for life; and after her decease, "one-half of the freehold property to my brothers and sisters for their life and then to come to their children and in the same manner to my wife, brother and brother's children and grand-children." He had twenty shares of stock. At the date of the will four of the testator's brothers and sisters were alive, two had died leaving children; at his death all the brothers and sisters were dead; four left children or grand-children. The wife who died before the testator had two brothers, one of whom was dead at the date of the will, but whose grand-children survived the testator; the other survived the testator, and had children. *Held*, that one-half of the property was divisible among the children (living at the testator's death) of his brothers and sisters *per stirpes*; and that the wife's surviving brother took the other half for life, and after his death it went to the children and grand-children (living at the testator's death) of the wife's brothers *per stirpes*; also, that, "&c.," did not include the stock.—*Barnaby v. Tassell*, L. R. 11 Eq. 863.

11. A master-mariner made his will, viz.: "This is the last will of me, G. R., that in case any thing should happen to me during the remainder of the voyage from hence to Sicily, and back to London, that I give," &c. The voyage was completed by the return of the ship to London; the testator afterwards died.—*Held*, that the will was contingent.—*In the goods of Robinson*, L. R. 2 P. & D. 171.

12. A married woman, having a power of appointment under a settlement, made her will in this form: "I direct the trustees under my marriage settlement to pay" certain legacies, "and to divide the remainder of my property" among certain persons; she also gave the trustees all necessary powers of sale, and to mortgage. *Held*, that the will was only an appointment of the the trust fund, and that the trustees acted under the settlement, not as executors.—*In the goods of Fraser*, L. R. 2 P. & D. 188.

13. A will written on the first sides of seven sheets of paper was found in a box of the deceased, and the first seven or eight lines at the beginning were partly cut and partly torn off. *Held*, that the tearing off of the first lines did not show an intention to revoke the whole will, and the remainder was admitted to probate.—*In the goods of Woodward*, L. R. 2 P. & D. 206.

14. A will was written and executed on the first side of a sheet of paper; it ended with an incomplete sentence followed by an asterisk, and the words, "see over;" on the second side was the remainder of the sentence. *Held*, that the words on the second side of the paper were to be regarded as an interlineation, and as part of the will.—*In the goods of Birt*, L. R. 2 P. & D. 214.

WORDS.

"Adjoining."—See VENDOR AND PURCHASER, 2. "All the Rest."—See WILL, 9. "Children or legal issue."—See WILL, 8. "Great Nephew, and other Nephews and Nieces."—See WILL, 4. "Lawful Excuse."—See CRIMINAL LAW, 2. "Money."—See WILL, 8. "Nuisance."—See VENDOR AND PURCHASER, 2. "Public Place."—See CRIMINAL LAW, 1. "&c."—See WILL, 10.

REVIEWS.

AN INDEX OF REPEALED AND REPEALING STATUTES AFFECTING PRINCIPALLY THE PROVINCE OF ONTARIO. By I. N. Winstanley, Barrister-at-law. Toronto: Henry Rowsell, 1871.

We acknowledge receipt of this Index, which can scarcely fail to be of great use to those for whom it is intended, and will doubtless command a ready sale.

We have for some time past been hoping to see something of this kind; the changes in the statute law are so rapid and confusing that any aid in keeping track of them will be received with satisfaction.

LA REVUE CRITIQUE. July, 1871. Montreal: Dawson Brothers.

The July number of this quarterly commences with an extract from the report of the Hon. J. H. Gray, on the assimilation of the Laws of Ontario, Nova Scotia and New Brunswick. The writer thus concludes:—

"The instructions given to me being simply to prepare for a commission hereafter to be issued—not to recommend or propose any form—I have confined my labor solely to pointing out the dif-

REVIEWS.

ferences; but there can be no doubt that an excellent practical Code of Law, simple in its language, easily understood, expeditious and economical in its administration, could be formed from a judicious selection of the best of the laws of each of the Provinces by men who were severally acquainted with each."

The advantages to be derived from one uniform system of judicature in all the Provinces of the Dominion would be immense, and great is the pity that in the Province of Quebec the possibility of any assimilation was considered too remote even to be alluded to in the British North America Act. The Law Reform Commission recently appointed in this Province will do well to keep in view the final end contemplated by that Act in making their report.

The industrious pen of Mr. Girouard contributes a lengthy essay upon the Treaty of Washington, looked at, as he says, in a purely legal point of view, but at the same time he appears to find it difficult to keep clear of its political bearing. Whether we agree with his conclusions or not, it is without doubt a valuable addition to our reading on this important and interesting subject.

The other articles are *Le Droit Constitutionnel du Canada*—An introductory lecture to the study of the law—Writs of Prohibition, and some others of no special interest in this Province. In an article on the Riel-Scott affair, the question is discussed as to whether the Dominion Government had or has now the power to take any legal steps to secure the punishment of the murderer Riel. The conclusion arrived at is as follows:—

"For these reasons, it does not appear to me that the Dominion Government could have taken, or could now take any legal steps to secure Riel's punishment as long as he is abroad, but as there is no Statute of Limitations with reference to murder, assuredly should he ever come within the Dominion, justice will be found to reach him and hands to take him."

This may be comforting to the writer, but not to the public, for scoundrels like Riel too often go unhung now-a-days to expect such a proper ending for him, and the last news from Manitoba seems to show how fallacious were the hopes of the writer.

LA REVUE LEGALE. Sorel, Quebec.

A periodical published entirely in French,

and therefore practically useless in Ontario. It appears to have a large circulation in Quebec.

DROIT CIVIL CANADIEN. Montreal: Alphonse Doutre & Co.

The civil law of Lower Canada, following the order established by the codes, is to be discussed in this volume. It is written in French, and can never, therefore, be of any general interest outside the limits of the Province of Quebec.

LOWER CANADA JURIST. Montreal: John Lovell.

We extract from time to time from this volume of reports such decisions as are of interest in this Province.

THE INSURANCE LAW JOURNAL. Baker & Voohris, 66 Nassau Street, New York.

This new publication is one of the innumerable publications that abound in the United States. It is to be "devoted to insurance law and the interest of insurance generally." We should suggest to the editor that the publication, or rather one branch of it, is rendered of little practical use, from the want of head notes and digests of the reports of decisions given in it.

CHICAGO LEGAL TIMES. Published every Saturday, by Mrs. Myra Bradwell.

On Saturday, the seventh day of this month, the great fire of Chicago commenced, and on Saturday, the fourteenth day of this month, the *Chicago Legal News* was published in its regular course, with nothing to show (except a reduction in the number of pages) that its office of publication had been consumed, as we are told, "with its entire contents, including a library of nearly two thousand volumes. All were destroyed, with the exception of our subscription book and ledger." Again, on the 21st instant, the usual weekly number was published.

The story of the burning has been told elsewhere; but "the ruins of Chicago" (so speaks an eye-witness) "were yet red-hot when five or six daily newspapers prepared to resume publication, in the midst of the smoke and fire."

In alluding to the losses sustained, the most plucky and enterprising Editor regrets the loss

PARTNERSHIPS OF SOLICITORS.—APPOINTMENTS TO OFFICE.

of so many files of legal exchanges, which were prized very much, and expresses the hope that her brethren of the legal press may as far as possible furnish her with duplicates of the papers destroyed. We most heartily sympathise with our cotemporary upon the losses sustained, and shall have great pleasure in replacing, so far as we can, the lost numbers of the *Canada Law Journal*.

No wonder that Chicago is rising from its ruins with a rapidity scarcely short of miraculous, when even the women there show an enterprise and business capacity that would put to shame those of the other sex in probably any other city in the universe.

Attorneys and solicitors have been accustomed, time out of mind, to form partnerships in business; and the advantages of the practice are manifold and obvious. The thing known as good-will—that is the connection with clients—the use of the name of a firm, with the prestige and influence attached to it, can best be preserved for the purposes of gift or sale by means of a partnership; for the sole possessor thereof may die, and leave only an imaginary succession behind him. So also combination of capital, the power of attracting capital enjoyed in a larger degree by a plurality of persons, the facility of carrying on a business without interruption from the periods of holiday and recreation, arising out of the mutual help of partners; all these considerations induce men to come together and act together as attorneys and solicitors. But on the other hand there are disadvantages incident to the practice which seem to us to be generally overlooked, or at least not sufficiently regarded. We allude specially to the risks attaching to the other partners from the fraud or negligence of a member of the firm. Recent cases have established in a very broad and sweeping manner the responsibility of partners in these matters. Last year we had a case of a well-known Birmingham attorney mulcted in thousands of pounds for the mere negligence of a partner acting in absolute disregard and defiance of the gentleman thus victimised. In 1868 we had the case of two gentlemen of note in the city compelled upon a bill in Chancery to make good more than £5,000 misappropriated by a partner. In a town in the North of England there are at this moment cases pending which involve a partner in a responsibility for many thousands of pounds, in which litigation is only avoided by the promptitude with which the solvent partner is redeeming the frauds of another member of the firm. In a case of *Young v. Long*, before Vice-Chancellor Malins, the defendant, a solicitor, was made liable for the sum of £2,723 misappropriated by a partner. Such cases, which we deeply regret to find, are not of unfrequent occurrence,

for they inflict irremediable loss and indeed ruin on innocent persons, and tend to dishonor the whole profession, form a terrible set-off to the advantages arising from solicitors acting together in firms, and at the least suggest the wisdom of exercising the greatest care and caution in the selection of partners, even if they do not prove that solicitors would do well to eschew partnerships altogether, and rely on their own industry and connection for success.—*Law Journal*.

It has been recently held in England that, on an appeal, evidence is not admissible in the Court of Bankruptcy which was not before the Court below, unless for special reasons the Court of Appeal should otherwise direct.—*Weekly Reporter*.

APPOINTMENTS TO OFFICE.

EXECUTIVE COUNCIL OF ONTARIO.

THE HON. STEPHEN RICHARDS, to be Secretary and Registrar of the Province of Ontario, in the room and stead of the Hon. M. C. Cameron, resigned. (Gazetted 29th July, 1871.)

THE HON. MATTHEW CROOKS CAMERON, to be Commissioner of Crown Lands for the Province of Ontario, in the room and stead of the Hon. Stephen Richards, resigned. (Gazetted 29th July, 1871.)

LAW REFORM COMMISSIONERS.

THE HON. ADAM WILSON, one of the Judges of H.M. Court of Queen's Bench for Ontario.

THE HON. JOHN WELLINGTON GWYNNE, one of the Judges of H.M. Court of Common Pleas for Ontario.

THE HON. SAMUEL HENRY STRONG, one of the Vice-Chancellors of the Court of Chancery for Ontario.

HIS HONOR JAMES ROBERT GOWAN, Judge of the County Court of the County of Simcoe, and

CHRISTOPHER SALMON PATTERSON, of Osgoode Hall, Barrister-at-law, Commissioners to inquire into and report upon the present jurisdiction of the several Law and Equity Courts of Ontario, and upon the modes of procedure now adopted in each, and upon such other matters and things therewith connected as are in the commission more fully set forth:—under the name and title of "Law Reform Commissioners." (Gazetted Sept. 23, 1871.)

COMMISSIONER IN EXTRADITION CASES.

FRANCOIS CARON, of the Town of Windsor, in the Province of Ontario, Esq., to be a Commissioner for the purposes contemplated in the Act of the Parliament of Canada, 31st Vic. Cap. 94. (Gazetted 7th October, 1871.)

COUNTY COURT JUDGE.

RICHARD JOHN FITZGERALD, of Osgoode Hall, and of the Town of Picton, in the Province of Ontario, Esq., Barrister-at-law, to be Judge of the County Court of the County of Prince Edward, in the said Province, in the room and stead of David L. Fairfield, Esq., deceased. (Gazetted 9th Sept., 1871.)

STIPENDIARY MAGISTRATE AND REGISTRAR.

DELEVAN D. VAN NORMAN of the Town of Simcoe, Esq., to be Stipendiary Magistrate and Registrar for the Territorial District of Thunder Bay, having his office at Prince Arthur's Landing, in the said district. (Gazetted 3rd June, 1871.)

PATRICK MCCURRY, of Osgoode Hall, Esq., Barrister-at-law, to be Stipendiary Magistrate and Registrar for the District of Parry Sound, in the room and stead of Jesse Wright Rose, Esq., deceased. (Gazetted 9th Sept. 1871.)

POLICE MAGISTRATE.

RICHARD H. HOLLAND, of Osgoode Hall, Esq., Barrister-at-law, to be Police Magistrate and Registrar in and for the Town of Port Hope. (Gazetted 9th Sept. 1871.)

MAXWELL W. STRANGE, of the City of Kingston, Esq., Barrister-at-law, to be Police Magistrate in and for

APPOINTMENTS TO OFFICE.

the City of Kingston. in the room and stead of John Creighton, Esq., resigned. (Gazetted 8th July, 1871.)

REGISTRARS.

STEPHEN BLACKBURN, of the City of London, Esq., to be Registrar in and for the West Riding of the County of Middlesex, having his office in the Village of Glencoe, in the said County. (Gazetted 22nd July, 1871.)

THOMAS LAUDER, of the Village of Durham, Esq., to be Registrar for the South Riding of the County of Grey, having his office at the Village of Durham, in the said County. (Gazetted 29th July, 1871.)

WILLIAM TORRANCE HAYS, of the Town of Goderich, Esq., Barrister-at-law, to be Registrar in and for the North Riding of the County of Huron. (Gazetted 30th Sept. 1871.)

SAMUEL ROBB, the elder, of the Town of Stratford, Esq., to be Registrar in and for the North Riding of the County of Perth, in the place and stead of William Smith, Esq., deceased. (Gazetted 30th September, 1871.)

PATRICK WHELIHAN, of the Town of St. Mary's, Esq., to be Registrar in and for the South Riding of the County of Perth. (Gazetted 30th September, 1871.)

JOHN ANDERSON, of the Village of Orangeville, Esq., to be Registrar in and for the North Riding of the County of Wellington. (Gazetted 30th September, 1871.)

DEPUTY CLERK OF THE CROWN, ETC.

JAMES LINDSAY, of the Village of Dunnville, Esq., to be Deputy Clerk of the Crown, and Clerk of the County Court of the County of Haldimand, in the room and stead of Robert N. Griffith, Esq., deceased. (Gazetted 18th May, 1871.)

CLERK OF THE DISTRICT COURT.

JAMES BENNETTS, of Bruce Mines, Esq., to be Clerk of the District Court of the Provisional Judicial District of Algoma, in the room and stead of Henry Pilgrim, Esq., resigned. (Gazetted 23rd September, 1871.)

NOTARIES PUBLIC.

WILLIAM WORTS EVATT, of the Village of Paisley, Esq., Barrister-at-law. EZRA ALBERT BATES, of the Village of Ampring, Gentleman, Attorney-at-law. (Gazetted 13th May, 1871.)

THOMAS MORPHY, of the Town of Brampton, Gentleman, Attorney-at-law. DUNCAN MCGIBBON, of the Town of Milton, Gentleman, Attorney-at-law. ROBERT W. PARKINSON, of the City of Toronto, Gentleman, Attorney-at-law. (Gazetted 20th May, 1871.)

JAMES BISHOP BROWNING, of the Village of Bracebridge, Gentleman, Attorney-at-law. (Gazetted 3rd June, 1871.)

FREDERICK COLQUHOUN, of the Village of Waterloo, Gentleman, Attorney-at-law. ALEXANDER FINKLE, of the Town of Woodstock, Gentleman, Attorney-at-law. FRED. D. VAN NORMAN, of the Town of Brantford, Gentleman, Attorney-at-law. JOSEPH JOHN MURPHY, of the City of Ottawa, Gentleman, Attorney-at-law. (Gazetted 1st July, 1871.)

JOSEPH E. MACDOUGALL, of the City of Toronto, Esq., Barrister-at-law. WALTER DUDLEY, of the Village of Newmarket, Esq., Barrister-at-law. JAS. J. FOY, of the City of Toronto, Esq., Barrister-at-law. JOHN ALEX. GEMMILL, of the City of Ottawa, Gentleman, Attorney-at-law. JOHN SECORD, of the Village of Tilsonburg, Gentleman, Attorney-at-law. (Gazetted 8th July, 1871.)

WILLIAM BELL, of the City of Hamilton, Esq., Barrister-at-law. SETH SOPER SMITH, of the Town of Port Hope, Esq., Barrister-at-law. WILLIAM H. MOORE, of the Town of Peterboro', Gentleman, Attorney-at-law. JOSEPH GODARD HALL, of the Town of Port Hope, Gentleman, Attorney-at-law. (Gazetted 15th July, 1871.)

WM. ALEX. HAMILTON DUFF, of the City of Hamilton, Gentleman, Attorney-at-law. (Gazetted 22nd July, 1871.)

JAMES H. MACDONALD, of the City of Toronto, Esq., Barrister-at-law. WM. GLENHOLME FALCONBRIDGE, of the City of Toronto, Esq., Barrister-at-law. (Gazetted 29th July, 1871.)

WILLIAM H. BILLINGS, of the Town of Whitby, Gentleman, Attorney-at-law. (Gazetted 20th Aug. 1871.)

ARCHIBALD HENRY MACDONALD, of the Town of Guelph, Esq., Barrister-at-law. FREDERICK JOHN FRENCH, of the Town of Prescott, Esq., Barrister-at-law. DANIEL WADE, of the Town of Pembroke, Esq., Bar-

ristar-at-law. DAVID BROWN ROBERTSON, of the Town of Belleville, Esq., Barrister-at-law. WILLIAM J. HANNAH, of the City of Toronto, Esq., Barrister-at-law. THOMAS JAMES WILSON, of the Village of Parkhill, Gentleman, Attorney-at-law. NORMAN FITZHERBERT PATERSON, of the Village of Beaverton, Gentleman, Attorney-at-law. RODERICK STEPHEN ROBLIN, of the Town of Picton, Gentleman, Attorney-at-law. (Gazetted 9th September, 1871.)

ROBERT THOMPSON LIVINGSTONE, of the Town of Simcoe, Esq., Barrister-at-law. JAMES F. MACDONALD, of the Town of Ingersoll, Esq., Barrister-at-law. PETER FRANK WALKER, of the Town of Goderich, Gentleman, Attorney-at-law. JAMES FLETCHER, of the Town of Brampton, Gentleman, Attorney-at-law. (Gazetted 16th September, 1871.)

DAVID LYNCH SCOTT, of the Town of Brampton, Esq., Barrister-at-law. WILLIAM HENRY FULLER, of the City of Kingston, Esq., Barrister-at-law. WALTER SCOTT WILLIAMS, of the Town of Napanee, Gentleman, Attorney-at-law. ANGUS BELL, of the Village of Southampton, Gentleman. (Gazetted 23rd September, 1871.)

NEIL M. MONRO, of the Village of Fergus, Esq., Barrister-at-law. MARK SCANLON, of the Village of Bradford, Gentleman, Attorney-at-law. (Gazetted Oct. 7, 1871.)

HENRY JOSEPH LARKIN, of the City of Toronto, Esq., Barrister-at-law. (Gazetted 14th October, 1871.)

JOHN WILLIAM DOUGLAS, of the Town of Perth, Esq., Barrister-at-law. (Gazetted 21st October, 1871.)

JOHN KENNEDY, of the Village of Mount Forest, Gentleman, Attorney-at-law. (Gazetted 21st Oct., 1871.)

ASSOCIATE CORONERS.

SIDNEY WILLIAM CLEGG, of the Village of Apsley, Esquire, M.D.; within and for the County of Peterborough. (Gazetted 6th May, 1871.)

JAMES HAYES, of the Town of Simcoe, Esquire, M.D.; within and for the Co. of Norfolk. (Gazetted May 6, 1871.)

JOHN M. FOWLER, of the Village of Burford, Esquire, M.D.; within and for the County of Brant. (Gazetted 2nd May, 1871.)

JOHN MEARNS, of the Village of Petrolia, Esquire, M.D.; within and for the County of Lambton. (Gazetted 3rd June, 1871.)

DANIEL J. M. HAGARTY, of the City of London, Esquire, M.D.; within and for the County of Middlesex. (Gazetted June 10, 1870.)

DAVID MITCHELL, of the Village of Constance, Esq., M.D.; within and for the County of Huron. (Gazetted June 24, 1871.)

WILLIAM S. CHRISTOE, of the Township of Artemesia, Esquire, M.D.; within and for the County of Grey. (Gazetted July 22, 1871.)

JOHN KELLY, of the Village of Little Britain, Esquire, M.D.; within and for the County of Victoria. (Gazetted July 22, 1871.)

WILLIAM LUMLEY, of the Village of Glencoe, Esquire, M.D.; within and for the County of Middlesex. (Gazetted July 22, 1871.)

EDWARD LOUIS ATKINSON, of the Village of Gananoque, Esquire, M.D.; within and for the County of Grenville. (Gazetted August 3, 1871.)

JOHN GODKIN GILES, of the Village of Farmersville, Esq., M.D.; within and for the United Counties of Leeds and Grenville. (Gazetted 20th August, 1871.)

WILLIAM C. LUNDY, of the Town of Amherstburg, Esq., M.D.; within and for the County of Essex. (Gazetted 26th August, 1871.)

ALBERT WILLIAM SOVEREEN, of the Village of Fredericksburgh, Esq., M.D.; within and for the County of Norfolk. (Gazetted 16th September, 1871.)

HENRY JOSEPH MURPHY, of the Town of Chatham, Esq., M.D.; within and for the County of Kent. (Gazetted 18th September, 1871.)

ABRAHAM PRATT, of the City of Ottawa, Esq.; within and for the county of Carleton. (Gazetted 23rd September, 1871.)

BRINSLEY MARCIUS WALTON, of the Village of Westmeath, Esq., M.D.; within and for the County of Renfrew. (Gazetted 30th September, 1871.)

JACOB GILBERT TERRVBERRY, of the Village of Burford, Esq., M.D.; within and for the County of Oxford. (Gazetted 21st Oct. 1871.)

MEETING OF THE COUNTY JUDGES.

DIARY FOR NOVEMBER.

1. Wed. *All Saints' Day.* Clerks of Local Municipalities to make out rolls of lands of non-residents whose names are not on assessment rolls.
5. SUN. *22nd Sunday after Trinity.*
12. SUN. *23rd Sunday after Trinity.*
16. Thur. Examination of Law Students for call, with Honors. Last day for service for Co. Court.
17. Fri. Examination of Law Students for call to the Bar.
18. Sat. Exam. of Articled Clerks for certificate of fitness.
19. SUN. *24th Sunday after Trinity.*
20. Mon. Mich. Term begins. Articled Clerks and Law Students to file certificates with Secretary of Law Society.
21. Tues. Exam. of Law Students for Scholarships.
22. Wed. Inter-Exam. of Law Students and Artic. Clerks.
24. Fri. Paper Day, Q. B. New Trial Day, C. P.
25. Sat. Paper Day, C. P. New Trial Day, Q. B.
26. SUN. *25th Sunday after Trinity.*
27. Mon. Paper Day, Q. B. New Trial Day, C. P. Last day for declaring in County Court.
28. Tues. Paper Day, C. P. New Trial Day, Q. B.
29. Wed. Paper Day, Q. B. New Trial Day, C. P. Last day for setting down and giving notice of rehearing.
30. Thur. *St. Andrew.* Paper Day, C. P. Open Day, Q. B.

THE

Canada Law Journal.

NOVEMBER, 1871.

MEETING OF THE COUNTY JUDGES.

The recent meeting of the County Judges, in Toronto, was, we understand, very numerously attended. It was purely a private one, and properly so, because the subjects discussed did not necessarily require publication in the public press.

The isolated position of County Judges is not without disadvantage to the Local Bench; indeed, one of the greatest advantages in centralization of Courts is the opportunity which the Judges have, as in the case of the Judges of our Superior Courts, of almost daily conference and intercommunication.

The result of the meeting cannot fail to be of profit to all who attended it, for we have been informed that the time was improved in discussing subjects of common interest, for instance, the administration of the Attorney-General's Act, for the speedy trial of criminals before the County Judge—the practice in the County Judges' Criminal Courts—the Division Court procedure—Jurisdiction under the Municipal and Assessment Acts—Appeals to the Sessions, &c. The Judges no doubt found interchange of thought in the matters discussed very advantageous and eminently calculated to secure uniformity of procedure and prevent that diversity of practice which to some extent prevails. The concurrent testimony was

strongly in favor of the County Judges' Criminal Courts as a most beneficial and economical method of disposing of criminal charges; and it would appear that all over Ontario prisoners have largely availed themselves of the privilege (we think we may so call it) of being promptly tried by a Judge.

There was one point discussed and determined which we have particular pleasure in noticing, though some possibly may not see the importance of it. After being canvassed in the meeting, a very decided majority pronounced in favor of the practice of the Judges wearing the gown in the Division Courts. Those who had not done so hitherto determined to wear the gown hereafter, and very properly so, for there would be little use in taking a collective expression upon such matters, if, after discussion, the views of the majority did not prevail. Besides, the practice is right in itself, and emphatically so since it has been decided by the Queen's Bench in *Re Allen*, that only professional men have the right to be heard as advocates in Division Courts. The readers of the *Law Journal* will remember that from the first, and persistently, we have advocated the practice of wearing the gown; and although the gentlemen who did not do so were evidently not persuaded by our argument, they have had the good taste, and, we will venture to add, the good judgment, to fall in with the resolution of the collective body of their own order.

We understand the Judges are to meet annually for the purpose of mutual conference, assistance and advice, in order to promote uniformity of practice and to increase their public usefulness—the fourth Tuesday in June being the time appointed, the place, Toronto. We are decidedly of opinion that a more praiseworthy step could not have been taken, and hope that all the County Judges in the Province, without exception, will so arrange their appointments as to enable them to attend the annual gathering.

The Chief Justice of the Court of Appeal sits in the Court of Queen's Bench this term, in place of Chief Justice Richards. Whilst regretting that the state of health of the latter is such as to render a cessation from work necessary, all on the other hand were pleased to see the former again "in harness," looking so well and vigorous after his partial rest.

THE LAW OF WILLS.

THE LAW OF WILLS.

An article headed "Wills and Intestacy," over the signature "J. H. Gray," has appeared in the October number of *La Revue Critique de Législation et de Jurisprudence du Canada*, on which we think it proper to make some observations. It commences by stating that—

"The increased intercourse between the different Provinces of the Dominion, brought about by Confederation, renders desirable a more general knowledge of the differences between them in the laws regulating the ordinary transactions of life. The business man from Ontario would be very apt to suppose that what he could do and would do in Ontario, would, under similar circumstances, be a rule of conduct for him in Nova Scotia and New Brunswick. The same of the business man from Nova Scotia or New Brunswick in Ontario. Called by the pursuits of trade to take up his temporary or permanent residence in one of the Provinces other than that in which he had been previously living, it is important to know how the wealth he is accumulating may be disposed of by himself; or, if he failed to will it, how the law would do it for him. There are few things more ruinous to the peace of families than a disputed will; few more conducive to the well-being of a people than a judicious law of intestacy. It is proposed to examine the provisions made in Ontario, New Brunswick and Nova Scotia, in these respects."

Fully concurring as we do in these remarks, we think it advisable to point out some statements in the article in question, which are perhaps calculated to mislead as regards the law in Ontario.

From the general tenor of the essay, it appears that the author professes to show wherein the law on the subject differs in the various Provinces. If his remarks were confined to the *statutes merely*, they would not be so open to criticism; but, as we have seen, he does not confine himself to those alone. He commences by stating that—

"In *New Brunswick*, a testator may, by his will, dispose of all property, and rights of property, real and personal, in possession or expectancy, corporeal and incorporeal, contingent or otherwise, to which he is entitled, either in law or equity, at the time of the execution of his will, or to which he may expect to become at any time entitled, or be entitled to at the time of his death, whether such rights or property have accrued to him before or after the execution of his will. In *Nova Scotia*, the same."

It is further said that—

"In *Ontario*, there is no provision of this general character; but, by the Consolidated Statutes of Upper Canada, chapter 82, section 11, real estate, acquired subsequently to the execution of a will, would pass under a devise conveying such real estate as testator might die possessed of."

Now, the provisions of this section of the U. C. Con. Stat. are overridden, if not virtually repealed, by the Ontario Act of 32 Vic. cap. 8, sec. 1, which now governs, and under which after-acquired property passes: *Gibson v. Gibson*, 1 Drew, 62; *Leith's Real Prop. Statutes*, 293. The statute we have referred to reads as follows: "Every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will."

Contingent and executory interests were devisable under the Statute of Wills of Henry VIII. and 1 Jarman on Wills, p. 43; and consequently, by reason of the application of that statute here, such interests were also devisable in Ontario since 32 Geo. III. cap. 1, introducing the English law. Independently of this, it has generally been considered here that the Consolidated Statute referred to, authorized devises to fully as large an extent as is said to be the law in New Brunswick: (See secs. 14, 11, 12.)

Further on in the article it is said that "in New Brunswick and Nova Scotia a testator must be of age," but that "in Ontario there is no provision to this effect." Now, the Statute of Wills of Henry VIII. is, as above mentioned, the origin and source here of the right to devise, and governs unless varied by subsequent Acts. It expressly exempts infants from the right there given to devise, and we need hardly mention that at common law no one could devise a freehold.

It is further said, where speaking of the execution of wills, that in Ontario there is no general statute, as in Nova Scotia and New Brunswick, with reference to wills; and reference is made to Con. Stat. U. C. cap. 82, s. 13. The Statute of Frauds should also have been referred to as applying to the mode of execution of wills here. That statute was introduced here by the Act of 32 Geo. III. cap. 1, above referred to. It is in force, and cumulative in its provisions with sec. 13 of Con. Stat.

THE LAW OF WILLS.

U. C. cap. 82. Mr. Leith, in his work on Real Property Statutes, vol. 1, p. 290, recites the provisions of section 5 of the Statute of Frauds (29 Car. II. cap. 8), which enacts as follows:

"All devises and bequests of any lands and tenements, devisable either by force of the Statute of Wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or of any particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else shall be utterly void and of none effect."

Mr. Leith then goes on to say—

"The variance between the statute of Charles and of William is this: that by the former the will must be attested and subscribed, *in presence of the testator, by three or four credible witnesses*, who need not subscribe or attest in the presence of each other, or at one and the same time: the latter statute is silent as to the credibility of the witnesses; and execution in the presence of and attested by two witnesses, is as valid as if in the presence of and attested by three witnesses; and it is sufficient if such witnesses subscribe in the presence of each other, without subscribing (as required by the statute of Charles) in the presence of the testator.

"Notwithstanding the act of William is silent as to credibility of the witnesses, that qualification still continues to be as requisite as under the act of Charles: *Ryan v. Devereux*, 26 U. C. Q. B. 107. The statute of Charles is not impliedly repealed by that of William: *Crawford v. Curragh*, 15 U. C. C. P. 55. It seems clear, therefore, that a will invalid as not complying with the latter Act, is valid if it complies with the former. In a late case (*Crawford v. Curragh*, supra), the court went further, and held, in effect, that the statutes were cumulative, and might be read together, and so that a will invalid under either statute, taken singly, might be supported on their joint authority. Thus a will executed in the presence of two witnesses, who subscribed in the presence of the testator, but not in presence of each other, has been held sufficient. The author does not presume to question the unanimous judgment of the court; but he deems it right, in a matter of such importance, to refer to the language of Draper, C. J., in a subsequent case, and to suggest that it may be a proper precaution always to comply with the statute of William, and require that when there are only two witnesses, they should sign in presence of each other. In the case referred to (*Ryan v. Devereux*, 26 U. C. Q. B. 107), Draper,

C. J., in alluding to the doctrine laid down in *Crawford v. Curragh*, says, 'I advisedly abstain from expressing an opinion of concurrence in, or dissent from, that decision. I have not arrived at any positive conclusion upon it.'

"The practitioner should bear in mind that the Imp. Act 1 Vic. cap. 26, has in England varied the mode of execution of wills, and therefore, the cases decided under that act may be inapplicable here, unless on the words 'signature,' 'presence,' 'direction,' 'other person,' 'attested,' 'subscribed,' which are common to the Imperial Act of Victoria, the Statute of Frauds, and the Provincial Act."

On again referring to the article in *La Revue Critique*, we find it stated that—

"Under the English law, as prevailing before 1st Victoria, chapter 26, whether a will of freehold estate attested by a witness whose wife or husband had an interest in the will as devisee or legatee, would be invalid or not, was to some degree uncertain, though if the devise or legacy had been to the witness himself, under 25 Geo. II. chapter 6, the doubt as to the invalidity is removed, because it clearly makes him competent, and declares the devise or legacy void."

As to these observations, we would refer to *Ryan v. Devereux*, 26 U. C. Q. B. 107, decided here in 1866; also *Little v. Aikman*, 28 U. C. Q. B. 337; and in England to *Holdfast v. Dowling*, 2 Str. 1258; and *Halford v. Thorp*, 5 B. & Ald. 589. In the case of *Ryan v. Devereux*, the plaintiff claimed under a conveyance from the heir-at-law of John Devereux, sen., and the defendant claimed under Devereux's will. The question for the court was, whether a certain Peter McOann, who had been one of the two subscribing witnesses to the execution of the will, was disqualified on account of his being at that time married to a daughter and legatee of the testator. It was held that he was so disqualified: that the bequest of a legacy to his wife was not avoided by 25 Geo. II. cap. 6; and that such bequest prevented him from being regarded as a *credible* witness within the meaning of the Statute of Frauds. The English cases have never been questioned there, and are referred to in the text-books as undoubted law. See also *Emanuel v. Constable*, 8 Russ. 436. On this point, therefore, we cannot agree that there has been any uncertainty in England or here, or that, as is further stated in another place, the question here is open.

Again, as regards obliterations, interlineations, or alterations made in a will after its

THE ELECTION LAWS.

execution: the Statute of Frauds applies here as introduced with the other general English Law by the above Act of 32 Geo. III. cap. 1, subject to the provisions of 32 Vic. cap. 8.

We have not, in the few remarks made above, touched upon all the points which are open to criticism in the article in *La Revue Critique*; but whilst the observations of the writer, and the mode he has adopted of comparing the law on the subject of wills in the different Provinces, would not, in our opinion, facilitate the object which is stated as the inducement for the article, we are free to admit that it gives the professional reader in Ontario some useful information as to the state of the law as to wills and intestacy in the Provinces of Nova Scotia and New Brunswick, with which the writer is probably more familiar than he is with that in Ontario.

SELECTIONS.

THE ELECTION LAWS.*

The coming year of 1872 will be one of much importance to the Dominion. The first Parliament will have closed its career, and the people will be called upon to choose those to whom they desire the public affairs shall be entrusted. The machinery of government applicable to a large confederation having been devised and set up by the Parliament which shall have passed away, the approval or condemnation of its acts must be submitted to those from whom, under our English constitution, the power emanates. No uniformity in the mode of selecting the representatives to the House of Commons having been agreed upon by Parliament, the selection will be left to each Province, to be made according to its own laws. By an Act passed at the last session of the Dominion Parliament, 34 Vic. c. 20, entitled "The Interim Parliamentary Elections Act, 1871," and to be in force for two years only from the time of its passing, section 2, it is declared: "The laws in force in the several Provinces of Canada, Nova Scotia and New Brunswick, at the time of the Union on the 1st of July, 1867, relative to the following matters, that is to say, the qualifications and disqualifications of persons to be elected or to sit or vote as members of the Legislative Assembly, or House of Assembly, in the said several Provinces respectively; the voters at elections of such members; the oath to be taken by voters; the powers and duties of Returning Officers; and generally the proceed-

ings at and incident to such elections, shall be provided by the British North America Act, 1867, continue to apply respectively to elections of members to serve in the House of Commons for the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick." There are certain exceptions, as to the polling in Ontario and Quebec lasting only for one day, and that the qualification of voters in Ontario shall be such as was by law in force on the 28rd of January, 1869; and a provision that the revisors in Nova Scotia shall add to the list of voters the names of such Dominion officials and employees as would have been qualified to vote under the laws in force in that Province on the 1st of July, 1867, but who may have been disqualified by act of the Legislature of that Province passed since that day. There are also provisions respecting Quebec, British Columbia and Manitoba, and on some other points, but not of a bearing necessary to be observed upon in this article.

Without commenting upon the propriety or impropriety of having the same House composed of representatives chosen under different laws, with different statutory qualifications, and elected in different ways, it is sufficient to say that Parliament in its wisdom thought proper to prefer such a course, leaving to the House hereafter to be chosen to determine whether the continuance of such a course shall be prudent for the future or not. The important questions of the qualifications of the candidates, of the nature and extent of the franchise, and of the mode of election, whether by ballot and simultaneous polling or not, will no doubt form during the discussions preceding, and the canvas pending the elections, the subject of many and exciting arguments.

Assuming that all are desirous of doing what is best for the country, it may be useful to compare the existing laws, and thus by contrast enable the people of all the Provinces to select from the legislation of each that which may be deemed best, not simply in theory but in practical working. For this purpose, it is proposed briefly to point out the salient features of the Election laws in the three Provinces of Ontario, New Brunswick and Nova Scotia (Quebec is not touched upon), and with reference to both British Columbia and Manitoba, it is manifest, a little time must be allowed to those two Provinces to develop their own systems.

In the three Provinces referred to, the Election laws differ very materially, both as to the qualification of the electors and the candidates, the mode and time of voting, and the restrictions imposed upon the exercise of the franchise.

First, as to the qualification of the voters:

In Ontario, every male person 21 years of age, a British subject by birth or naturalization, not coming under any legal disqualification, duly entered on the last revised and certified list of voters, being actually and bona fide the owner, tenant or occupant of real

* We reprint this article, from *La Revue Critique*, as interesting at the present time, and as it gives information as to the law on the subject in the sister Provinces. We have not, however, examined it with the view of seeing how far the writer is correct in his statement of the law in this Province. —*Edw. L. J.*

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property of the value hereinafter mentioned, and being entered in the last revised assessment roll for any city, town or village, as such owner, tenant or occupant of such real property, namely:

In Cities, of the actual value of....	\$400
In Towns " " " " " " " "	800
In Incorporated Villages, " " " " " "	200
In Townships " " " " " " " "	200

shall be entitled to vote at elections for members for the Legislative Assembly.

Joint owners or occupiers of real property rated at an amount sufficient, if equally divided between them, to give a qualification to each, shall each be deemed rated within the Act; otherwise, none of them shall be deemed so rated.

"Owner" means in his own right, or in right of his wife, of an estate for life, or any greater estate.

"Occupant," *bona fide* in possession, either in his own right or in right of his wife (other than as owner or tenant), and enjoying revenues and profits therefrom to his own use.

"Tenant" shall include persons who, instead of paying rent in money, pay in kind any portion of the produce of such property.

In *Nova Scotia*, every male subject by birth or naturalization, 21 years of age, not disqualified by law, assessed on the last revised assessment roll, in respect of real estate to the value of \$150, or in respect of personal estate, or of real and personal together, of the value of \$300, shall be entitled to vote.

Also, when a firm is assessed in respect of property sufficient to give each member a qualification, the names of the several persons comprising such firm shall be inserted in the list, but no member of a corporate body shall be entitled to vote or be entered on the list in respect of corporate property.

Also, when real property has been assessed as the estate of any person deceased, or as the estate of a firm, or as the estate of any person and son or sons, the heirs of the deceased in actual occupation at the time of the assessment, the persons who were partners of the firm at the time of the assessment, and the sons in actual occupation at the time of the assessment, shall be entitled to vote, as if their names had been specifically mentioned in the assessment, on taking an oath, if required, in accordance with the facts coming within the separate classification of the above provisions.

In *New Brunswick*, every male person 21 years of age, a British subject, not under any legal incapacity, assessed for the year for which the Registry is made up—in respect of real estate to \$100, or personal property, or personal and real, amounting to \$400, or on an annual income of \$400—shall be entitled to vote.

Thus, in both *Nova Scotia* and *New Brunswick* the franchise is more extended than in *Ontario*. In *Ontario* it still savours of the real estate. In *New Brunswick* and *Nova Scotia* it is based upon personal estate, *per se*, as well as real estate.

In *Ontario*, certain persons are forbidden to exercise the franchise, whether qualified or not, namely, Judges of the Supreme Courts, of County Courts, Recorders of cities, officers of the Customs of the Dominion, Clerks of the Peace, County Attorneys, Registrars, Sheriffs, Deputy Sheriffs, Deputy Clerks of the Crown, Agents for the sale of Crown lands, Postmasters in cities and towns, and Excise Officers, under a penalty of \$2,000, and their votes being declared void.

Again: no Returning Officer, Deputy Returning Officer, Election Clerk or Poll Clerk, and no person who at any time, either during the election or before the election, is or has been employed in the said election, or in reference thereto, or for the purpose of forwarding the same, by any candidate, or by any person whomsoever, as counsel, agent, attorney or clerk, at any polling place at any such election, or in any other capacity whatever, and who has received, or expects to receive, either before, during or after the said election, from any candidate, or from any person whomsoever, for acting in any such capacity as aforesaid, any sum of money, fee, office, place or employment, or any promise, pledge or security whatever therefor, shall be entitled to vote at any election.

No woman shall be entitled to vote at any election.

In *New Brunswick* and *Nova Scotia*, there is no restriction as to the exercise of the franchise by persons who are duly qualified. On the contrary, express provisions are made to enable presiding officers, poll clerks, candidates and their agents, when acting in the discharge of their various duties connected with the election, to poll their votes in districts where otherwise, but for such provisions, they would not be entitled to vote.

As to the Qualification of Candidates.

In *Nova Scotia*, the candidate must possess the qualification requisite for an elector, or shall have a legal or an equitable freehold estate in possession, of the clear yearly value of eight dollars.

In *New Brunswick*, the candidate must be a male British subject, 21 years of age, and for six months previous to the date of the writ of election have been legally seized as of freehold for his own use of land in the Province of the value of £300, over and above all incumbrances charged thereon.

In *Ontario*, by the Act of 1869, 33 Vic. c. 4, passed to amend the Act of the previous session, entitled, "An Act respecting Elections of Members of the Legislative Assembly" (the 32 Vic. c. 21), it is enacted, "That from and after the passing of that Act, no qualification in real estate should be required of any candidate for a seat in the Legislative Assembly of *Ontario*; any statute or law to the contrary notwithstanding, and every such last mentioned statute and law is hereby repealed."

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Neither the said 82 Vic. c. 21, nor the preceding Acts of the same session, caps. 8 & 4, defining the privileges, immunities and powers of the Legislative Assembly, and for securing the independence of Parliament, point out what shall be the qualifications of a candidate, and the previous Acts in the Consolidated Statutes on the subject have been repealed.

By the 23rd section of 82 Vic. c. 21, 1868-9. the electors present on nomination day are to name the person or persons whom they wish to choose to represent them in the Legislative Assembly. There is no restriction, as in Nova Scotia, that a candidate must have the qualification of an elector, which, among others, is that he shall be a male subject by birth or naturalization, or, as in New Brunswick, specifically, that he must be a "male British subject."

In the Ontario Act, 82 Vic. cap. 21, sec. 4, it enacts: "No woman shall be entitled to vote," but there is no restriction in the 23rd section as to the sex of the person or persons whom the electors shall choose to represent them in the Legislative Assembly, nor is there any clause in the two Acts, caps. 8 & 4, above referred to, from which any such restriction can be inferred. The 61st section of 82 Vic. cap. 21, declares, "That no candidate shall, with intent to promote his election, provide or furnish," &c. But by the General Interpretation Act, passed by the Legislature of Ontario, cap. 1, 81st Vic. (1867-8), sec. 6, clause 8, it is enacted that "words importing the singular number, or the *masculine* gender, shall include more persons, parties or things of the same kind than one, and *females* as well as males, and the converse."

And by the 8rd section of the same Act the interpretation clauses were to apply to all Acts thereafter passed.

Thus it would appear, that if the electors present on nomination day choose a female as a candidate, and, in case of a poll being demanded, she should be elected, she would be entitled to take her seat as a member in the Legislature of Ontario.

In this respect Ontario differs from the other two Provinces, and may be said to be in advance of both England and the United States on this point.

This difference—assuming that the above construction of the Ontario Act is correct—is one of so much discussion at the present day, that it may not be uninteresting to refer to a very important argument and decision which took place in the Common Pleas in England almost at the time the Act was under consideration in the Ontario Legislature, and which it is presumed must have come under the observation of the very able legal men in that House. The argument was commenced early in November, 1868, and judgment given in January, 1869. The case of *Chorlton*, appt. v. *Lings*, resp., L.T.N.S., 1868-9, 584, L.R. 4 C. P. 874, 5 C.L.J.N.S. 102. The name of Mary Abbott, with a large number of other women, appeared

upon the lists of voters for members of Parliament for the Borough of Manchester. Her name was objected to and struck off by the revising barrister. Her statutory qualification otherwise than as a woman was not disputed. On appeal from the decision of the revising barrister, the case was argued by Coleridge for the appellant, by Mellish for the respondent. The decision which was to govern the other cases as well as her own was that she had not a right to vote. In the course of the argument, some observations were made by the counsel and the judges, which will aid us in the construction to be put upon the Ontario Act, bearing in mind that the question here is not the right of the woman herself to exercise a right or privilege, but *the right of the electors not to be restricted in the exercise of their rights—that is the right of selection.* And further, whether when in a particular statute, dealing with an entire question, a particular resolution is made with regard to a particular class of persons, it does not negative the application of any other restriction to the same class, than the restriction named, assuming that in other respects the requisitions under the statute are complied with. The Ontario Statute first gives the franchise to every "male person," &c., then as if that was not sufficiently explicit, as if to remove the very doubt which has been raised in England, and to show that the consideration of woman's rights and her position had not been overlooked, it declares "no woman shall be entitled to vote at any election." When it comes to the nomination of candidates, it requires the sheriff to call upon the electors present to name the "person" or "persons" whom they desire to choose without any restriction in such selection as in the case of the franchise to the *persons* being male. By a subsequent Act, c. 4, 1869, the legislature abolishes the qualification in real estate, thus removing the inference to be drawn as to night service and the feudal tenure referred to by one of the judges in *Chorlton v. Lings*. Then assuming that the selection is of a woman of full age—a female sole—*compos mentis*—not under any restraint from infancy or marriage or any legal incapacity from crime—does she not come sufficiently under the term "person" to be within the Act. In the case referred to, Mr. Mellish in his very able argument against the construction of the English statute, which Sir John Coleridge was contending for; viz., that woman had the right to vote, because under Lord Romilly's Act, words importing the masculine gender included the feminine, says; "No one can doubt that in this Act (that is the Representation of the People Act, 1867), the word "man" is used instead of the word "person" for the express purpose of excluding "woman," thereby admitting that if the word "person" had been used (in the absence of anything else in the Act, to control it) woman would have been included." Chief Justice Bovill, in referring to the Reform Act of 1852, and to

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the Representation of the People Act, 1867, says: "The conclusion at which I have arrived is that the Legislature used "*man*" in the same sense as "*male person*" in the former Act, and this word was intentionally used to designate expressly the male sex, and that it amounted to an express enactment and provision that every man, as distinguished from woman, possessing the qualification, was to have the franchise, and in that view Lord Romilly's Act does not apply to this case, and will not extend the word "*man*" so as to include "*woman*." The other judges, Willes, Byles and Keating, fully concurred with the Chief Justice as to the construction to be put upon the statute, saying that the words "*man*" and "*male person*," together with the context of the statute throughout, showed conclusively that it was not intended to confer the franchise on women. Judges Willes and Byles went further, expressing their opinion that women were under a "legal incapacity" from either being electors or elected; the latter observing that "women for centuries have always been considered legally incapable of voting for members of parliament, as much so as of being themselves elected to serve as members," and he hoped "that the ghost of a doubt on this question would henceforth be laid forever." Even the casual opinion of such eminent men is entitled to the highest respect, though the point actually under their consideration and decided by them, was the construction of a particular statute as to the right of a woman to vote, not as to the right of the electors to choose one as their representative. The language of the statutes before them was different from the language of the Ontario statute. The latter is the one which governs here. It professes to deal with the whole question—being essentially a question—with which the Ontario legislature had the exclusive power to deal. It classifies and deals with the voters and candidates separately and exhaustively, and throughout the whole contest there is nothing inconsistent with such a conclusion.

Ansley (Thomas Chasbolm) in his able review of the Representation of the People's Act, 1867, and of the Reform Act of 1882, ably handles the whole subject, and differs entirely from the views laid down by the learned judges on the case referred to—not upon the broad question, but upon the construction of the statute. His work was written in 1867, their decision given in 1869. In the course of his work he gives Mr. Denman, Q. C., as authority for the statement that the word "*person*" used in an Act of the legislature of one of the colonies of Australia had given the franchise to women.

It is also further to be observed, that in the Imperial Act 33 and 34 Vic. c. 75, entitled "An Act to provide for Public Elementary Education in England and Wales," (passed in 1870, since the decision in *Chorlton v. Lings*), which regulates the distribution and management of the parliamentary annual grants, in

aid of public education, and provides for such distribution and management by means of a board or school parliament, with great powers, chosen by election by the ratepayers, the word "*person*" is used throughout with reference to those chosen to form the board, and under that designation women have been held eligible and taken their seats, notwithstanding that in speaking of such members the word "*himself*," and other words of the masculine gender only, are used. It would seem, therefore, taking all points into consideration, to require an arbitrary and unusual construction to be put upon such word, to deprive the electors of Ontario of the right of choosing a female representative for their own legislature, if they be so minded.

In all three of the Provinces persons holding offices of profit or emolument under the Crown, excepting members of the executive government, are debarred from holding seats in the Assembly. In all the three Provinces there must be a registration of voters, the foundation in all being the same, namely—the assessment list of the district—the details for the register of voters, simply varying according to the qualifications which give the vote, and which entitles the voter's name to be put upon the list—the exceptional instances in Nova Scotia being when the representatives of a deceased party, or the members of a firm assessed are entitled to vote: and in New Brunswick, when there has been no assessment in the parish for the year for which the list ought to be made up.

In Ontario the voting is *viva voce*.

In New Brunswick and Nova Scotia—by Ballot—introduced in elections in New Brunswick in 1855; in Nova Scotia in 1870.

The mode of conducting the Election.

The mode of conducting the election by ballot is very much the same in Nova Scotia as it is in New Brunswick, the most material distinction between the two being that in the several polling districts in New Brunswick the ballots are openly counted at the close of the poll at each polling place, in the presence of the candidates, or their agents, duly added up openly in the presence of all parties, entered in the poll books or check list, signed by the poll clerk, and countersigned by the candidates or their agents, and the ballots then forthwith destroyed, the countersigned poll book or check list with a written statement of the result of the poll at that district, with the signatures of the candidates or their agents is then forthwith enclosed, sealed up, and publicly delivered to the presiding officer to be transmitted to the sheriff to be opened on declaration day.

Whereas in Nova Scotia the ballot boxes, with the ballots, are sealed up and sent. This mode was in accordance with the law first introducing the ballot in New Brunswick, but, being found liable to abuse, was subsequently amended as above mentioned.

THE LATE SIR JOHN ROLT.—CONTRACTS IMPOSSIBLE OF PERFORMANCE.

In Nova Scotia, the 17th section of the Act of 1870, introducing the ballot, abolishes the public meeting held by the sheriff on nomination day, but he is to attend at the Court-house or other place prescribed, between 11 a.m. and 2 p.m., for the purpose of receiving the names of the candidates, and he shall exclude all persons not having business in connection with the election.

In Ontario and Nova Scotia, in case of a general election, the polling must be simultaneous throughout the whole Province.

In New Brunswick it is not so; the sheriff or the presiding officer for the county or city selects such time within the writ as he deems most suitable for the convenience of the electors within his county.

As under the Dominion Act, with the exceptions pointed out, the elections are to be held under the laws which were in force on the 1st of July, 1867. The reforms introduced into Nova Scotia by the Act of 1870, of the ballot and the abolition of the hustings on nomination day, will not be applicable.

THE LATE SIR JOHN ROLT.

The career of the late Sir J. Rolt, who died in June last, strikingly vindicates the truth of the aphorism that the Law is always just to those who are just to her. Sir John had no advantages, and he owed his fortune and eminence to his high character, his untiring assiduity, and his excellent parts. Sir John was not a genius, unless we accept the dictum of a famous character who said, 'Genius is only another name for industry.' What Sir John achieved any one endowed with good ability, an iron constitution, zeal and integrity may, without presumption, hope to accomplish.

Sir John Rolt was born in Calcutta in 1804. He was sent to England with his mother, and soon after his father failed in business. This rendered it impossible to give the boy an education, and he was apprenticed to a linendraper. His next employment was secretary to an institution, an appointment which he continued to hold even after he had become a clerk in the office of Messrs. Pritchard & Sons, the well-known proctors of Doctors' Commons. In those days the Benchers of the Inns of Court were not so strict as they are now, and Mr. Rolt was permitted to keep his terms without resigning his post in Doctors' Commons. Probably, had he gone among the proctors in earlier youth, he would have become one of them, and would have contented himself with money-making till 1858 and a pension after the Probate Act. But at his age the doors of that branch of the profession were shut against him, and so he betook himself to Lincoln's Inn. He was not called to the bar until 1837, when he was in his thirty-third year. He obtained an excellent business as a junior, and in eleven years he received silk from Lord Lyndhurst. In 1867 he entered Parliament

for the Western Division of Gloucestershire—his maternal grandfather was a Gloucestershire yeoman—and continued to represent that county until 1867. He was a consistent and valued supporter of the Conservative party, and in 1866 became Attorney-General. In 1867 he succeeded Sir James Knight Bruce as one of the Lord Justices of Appeal. The highest expectations were formed of his judicial career, but unhappily he was very soon after his appointment attacked with paralytic symptoms, and had to resign. In surveying his career, we cannot, while admiring his honorable ambition and his indefatigable ardor, refrain from doubting whether he really took the course calculated to ensure genuine happiness to himself or his family in this world. There are games which are not worth the candle, and Sir John has himself been heard to say that no success, however great, could compensate him for what he had undergone. We are all, perhaps, too apt to look at the crowning glory of a man's life, without sufficiently considering whether fortune has not been bought at too high a price.

CONTRACTS IMPOSSIBLE OF PERFORMANCE.

A new case of importance confirms a rule which, however, has been far from invariably assented to. *Robinson v. Davison* excited some interest when it was first heard at the assizes, and in its form in the Court of Exchequer (24 L. T. Rep. N. S. 755) it loses none of that interest for lawyers. It will be remembered that the defendant was the husband of the famous Arabella Goddard, and he undertook that she should perform at a particular concert. She was unable to do so owing to illness. Could damages be recovered for the breach of contract? The Court of Exchequer said, No.

It was argued in *Thorburn v. Whitacre* (2 Lord Raym. 1164) that there are three descriptions of impossibility that would excuse a contractor—legal impossibility, as a promise to murder a man; natural impossibility, as a promise to do a thing in its nature impossible; and thirdly, that which is classed as "*impossibilitas facti*," "where, though the thing was possible in nature, yet man could not do it, as to touch the heavens, or to go to Rome in a day." All must agree with Chief Justice Holt that these may be reduced to two—impossibilities in law, and natural impossibility. Without discussing all the cases relating to impossible contracts, which will be found collected in a note to Mr. Benjamin's work on the Sale of Personal Property, p. 428, we will confine ourselves to the effect of illness.

One of the leading cases on this subject reveals one of the delightful differences of judicial opinion with which we are familiar. In *Hall v. Wright* (1 L. T. Rep. N. S. 230) a plea to an action for breach of a contract to marry was that before breach the defendant became afflicted with dangerous bodily illness, and

CONTRACTS IMPOSSIBLE OF PERFORMANCE.—PROSECUTIONS AND THE POLICE.

was thereby 'incapable of marrying without danger to his life. The Court of Queen's Bench was equally divided; and the Exchequer Chamber was also divided, four Judges holding the plea bad, three holding that it was good. Judgment was therefore entered for the plaintiff. The contract of marriage is peculiar, and likely to be affected by bodily illness on the one side or the other; and as Baron Watson said, unless stated to be otherwise, a contract to marry must be taken—as was stated in the declaration—to be of the ordinary kind, with all its usual obligations and incidents. It is difficult to speak of this case with any confidence one way or the other, but the view put by Mr. Justice Willes seems to be consistent with common sense—that which cannot without danger be consummated by either contracting party ought to be voidable only on the election of the other. "If the man were rich or distinguished, and the woman mercenary or ambitious, she might still desire to marry him for advancement in life. . . . I might put the case of a real attachment, where such an illness as that stated in the plea supervening might make the woman more anxious to marry, in order to be a companion and a nurse, if she could not be the mistress, of her sweetheart." Not even a lawyer can regret that the plaintiff had a verdict.

Such a case as *Hall v. Wright* puts in a clearer light the accuracy of the decision in *Robinson v. Davison*, for the services of the performer are required for one single purpose, which purpose she was unable to accomplish; whereas, in *Hall v. Wright*, some of the objects of the contract might be attained, and performance of the contract was not impossible but only dangerous. But it is to be observed that the nature of the contract is of which the law will excuse the performance, on the ground that it is impossible. The rule and the exceptions are carefully stated by Mr. Justice Blackburn in *Taylor v. Caldwell* (8 L. T. Rep. N. S. 356), where he says—"There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay the damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burthensome or even impossible." He then goes on to say; "But this rule is only applicable when the contract is positive and absolute, and not subject to any condition, either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done: there, in the absence of any express or implied warranty that the thing shall exist,

the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

Now it is clear that no ordinary contract would contain a warranty as to the continuance of health on the part of one of the contractors, and where there is no such warranty it is hard to see how it was possible to enforce a personal contract, or to recover damages for its breach where illness prevents its performance. And there is only one further question in connection with the subject, and that is raised by Baron Cleasby, who would seem to suggest that a performer was not bound to appear and carry out her contract unless it is possible to fulfil it in all respects according to its terms. His Lordship said: "This was a contract to perform as a pianiste at a concert; in truth, to be the sole performer, and to do what requires the most exquisite taste and the greatest artistic skill, and which, unless well done, would disgust the audience, who naturally expect a great deal from so great a performer. That being so, the question arises, can this be done by the person engaged unless well and in good health?"

No such considerations as are here stated, can, in our opinion, be accepted as weighing on one side or the other. If a performer can scramble or struggle through an entertainment even discreditably, and even, we would add, disgusting the audience thereby, and is not absolutely disabled, he is bound to go on with his undertaking. If a skillful person contracts to do a certain thing requiring the utmost skill, he cannot be excused on the ground that he is by reason of ill health incapable of fulfilling his contract as skillfully as he would have done had he been in health. It would be vain to give greater latitude to a plea of impossibility arising out of natural incapacity than has hitherto existed. The incapacity, as in *Hall v. Wright*, should be total for all intents and purposes, and in no degree merely partial. If it is ever held otherwise, a wide gate would be open to the fraudulent evasions of a contract.—*Law Times*.

PROSECUTIONS AND THE POLICE.

The police have been severely censured for their conduct of the prosecution in the Eltham murder. It is said that having constructed a theory at the commencement of the case, they devoted their entire attention to the procuring of evidence to confirm their suspicion. They believed that they had got the right man, and so believing, they could recognise no evidence that did not fall in with their preconceived views.

Undoubtedly there was much in the conduct of the case for the prosecution that proved the need for a professional public prosecutor. The proper business of the police is to gather to-

PROSECUTIONS AND THE POLICE.—LARCENY—ANIMALS FERÆ NATURÆ

gether every fact affecting a crime, and place it in the hands of some competent solicitor, by whom all may be sifted—what is worthless put aside, and the clue followed up where the evidence is weak. The Greenwich police are not lawyers, and they were not advised by a lawyer. On the first aspect of the facts, there were strong grounds for suspicion. It must be remembered, in their justification, that they were informed of a great deal that was not legal evidence, and that in the pursuit of justice it is necessary to pick up every thread that may guide to discovery. The commentators on the conduct of the case appear to forget that the police were in possession of a great deal which though not admissible in the witness box, is yet called "moral evidence"—that is to say, evidence which *influences* the judgment, though not legally controlling it. It is right to exclude such evidence at the trial, because it is open to a certain amount of question as being in some case unreliable; but no individual would dream of excluding those facts from his consideration on any matter, when his object was to form a fair judgment of the truth. The communications of the murdered girl to her friends as to her relationship with accused, were properly excluded from the witness box, because it would be most dangerous to condemn a man to punishment upon statements made by some person behind his back. But the police were bound to take these statements into consideration for the purpose of investigation, and to help their own judgments in the pursuit of legal evidence. It was, to say the least of it, a remarkable coincidence that she should have said so much before the murder about a man who on that very evening was found to be going, in a muddy state, in a direction from the very spot where she was killed. Extraordinary coincidences do occur, and from the evidence adduced for the defence this appears to be one of them. But the police must act according to the usual human experience, and they would have no right to treat concurrent facts as mere coincidences until they are proved to be so, and no proof of this was given until the trial produced the witnesses that answered the probabilities by the facts. What the poor girl had said about Pook could not, without gross injustice, have been put in evidence against Pook; but it could not fail to make an impression upon the mind, and to direct the suspicions of the police, and they are not to be blamed for acting upon those suspicions and following up the clue which had thus been given to them. Their error lay in not putting before the jury all the facts they had found. But, then, their answer to this is that the case was out of their hands, and had passed into the possession of the lawyers. Thus much is due to them.—*Law Times*.

LARCENY—ANIMALS FERÆ NATURÆ

The Queen v. Townley, C. C. R. 19 W. R. 725.

This case is of some value as illustrating the distinction between what will be regarded as one continuous act, and what as to two distinct acts. The prisoner was indicted for a larceny of rabbits. He came in a cab and removed rabbits which had been hidden under a hedge, and it was found by the jury that they had been placed there by poachers, who had killed them on land in the same occupation as the place where they were found; it was also to be taken as a fact that the poachers had not intended to abandon possession of them. It was not found by the jury, or stated in the case as assumed, *but it was assumed by the Court* that the prisoner was himself one of the poachers. The Court held that the whole was one continuous act, and that therefore, although the rabbits did according to *Blades v. Higgs* (13 W. R. 727), become the property of the landowner on whose land they were killed, the prisoner was not guilty of larceny. This seems more in accordance with common sense, than the refinement as to an act "not continued but interpolated," which seems sanctioned by the passage in 1 Hale, P. C. 510, commented on by the Court, and explained away in a manner which Lord Hale would probably not have approved. The lapse of time between one particular act and another, or even the temporary absence of the perpetrator from the spot where the goods lie, may be evidence of whether the whole is one thing, or whether the acts are to be taken as distinct; but it can be no more. The continued *intent* seems to be the distinguishing test. If, to use the illustration of orchard robbery quoted by Blackburn, J., from Lord Cranworth's judgment in *Blades v. Higgs*, the thief after picking the apples found them more than he could carry, and went home for a truck, would the continuity of the act have been broken? It would seem not. But if from lapse of time or from other circumstances it could be inferred that the thief had given up his intention to remove the goods, but afterwards resumed it and removed them, it could no longer be said that the act was a continuous one.

The case might be noted by game law reformers as illustrative of the anomalies resulting from the present state of the law.—*Solicitors' Journal*.

There seems to be a curious desire to fasten upon the legal profession the character of ebriosity. If we are to give credence to all the charges which are so freely made in the present day, in reference to different classes of society, we must perforce conclude that we have fallen upon a crapulous age, however unconscious many of us may be of the unattractive phenomena which are said to be so patent to the observation of our more censorious contemporaries. The *American Law Review* tells us that

IN THE MATTER OF SOPHIA LOUISA LEIGH.

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"In America all lawyers drink; *very few are sober after ten o'clock in the morning.* It is not customary to keep sherry bottles or beer barrels in offices, because sherry and beer are rarely drunk in America—except by women. Lawyers, like all other men, drink whiskey, and for this purpose a hogshead of it is kept in every practitioner's safe. Formerly, it was kept in the main office, but since the introduction of wall safes (and the passage of the prohibitory laws, which are now so common throughout the country) the safe has been found the most convenient place. For conveyancers, the register of deeds keeps a supply. This practice is entirely unknown to the English, owing to the absence of compulsory registration. Formerly, in Massachusetts, no contract was considered valid in the profession, unless it had been, to use the term then in vogue, "ratified." Ratification consisted of a solemn drink, *inter partes*, participated in by the attorneys. Whether this custom would ever have ripened into law it is impossible to say, because the practices we have been describing excited for some reason so much animosity among the Jesuits, that they procured the enactment of a prohibitory law by the legislature, nominally directed against the sale of all liquors, really however, against the Bar. This has resulted in making alcoholism in chambers more secret. It is thought, however, that nothing will totally eradicate it, except the introduction of light European wines."

What can this mean? Is it that the public which has endured a "Tammany Hall" and an "Erie Ring" puts up, as a small matter, with a legal profession "very few of whom are sober after ten o'clock in the morning;" or is this piece of self-accusation as ridiculous as the mare's nest of legal alcoholism lately unearthed by a legal journal on this side of the Atlantic? American lawyers who come to England tell us that lawyers in the States work nothing like so hard as their brethren here. The tone, too, of the legal profession is very much less fastidious in America than in England. But there is moderation, and we do not believe that the American lawyers are the exception which proves that rule. The paragraph in our transatlantic contemporary's pages, if not intended as a hoax, must have been written, after ten a.m. by an unfortunate specimen in a mood of generalization.—*Solicitors' Journal.*

It has been held in England, in *Lee v. The Lancashire and Yorkshire Railway Company*, that the legal and equitable rights of a passenger injured by a railway accident are exactly the same as those of a passenger injured by any other common carrier, and the same considerations and rules apply in both cases. And that where a receipt has been given under seal it discharges at law all cause of action, and can only be set aside by the equitable jurisdiction of courts of law; but a mere receipt in writing has no such effect, it amounts simply to an acknowledgment of money paid; it cannot be pleaded in answer to an action, and it may be impeached or explained by parol evidence.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

IN THE MATTER OF SOPHIA LOUISA LEIGH *

Custody of children—Con. Stat. U. C. cap. 74, sec. 8.

Upon an application by the mother, under Con. Stat. U. C. cap. 74, sec. 8, for the custody of her infant daughter, four years of age, the husband and wife having separated: *Held*, (after reviewing the cases decided under the corresponding English Act,) that the statute in question does not take away the common law right of a father to the custody of his child, but only makes the recognition of this paternal right conditional upon the performance of the marital duty, and subjects it, in some degree also, to the interest of the child.

If, therefore, upon an application of this kind, it appears that the husband and wife are living apart, the court will inquire into the cause of their separation, in order to ascertain

(1) Whether the husband has forfeited, by breach of his marital duties, this *prima facie* right to the possession of his children. (2) And whether the wife, by deserting the husband without reasonable excuse, has relinquished her claim to the benefit and protection of the statute, which was intended "to protect wives from the tyranny of their husbands, who ill-used them."

[Chambers, May 17, 1871.—Gwynne, J.]

This was a petition, under Con. Stat. U. C. cap. 74, sec. 8, by Mrs. Henry Leigh, praying that her infant daughter, Sophia Louisa Leigh, aged four years, might be taken from the custody of its father and delivered to her.

It appeared, from the affidavits filed on the application, that the husband and wife had been living apart since April, 1870; the cause of separation alleged by the petitioner being her husband's ill-treatment of and cruelty towards her for eight years previous to that time. The husband, in reply, filed the affidavits and certificates of a large number of his neighbours, all of whom testified in the strongest terms to the high character which he had always borne in his social and domestic relations. He also fully met and disproved the allegation of the petitioner that on account of hereditary insanity in his family, it would be unsafe to entrust him with the custody of the child.

The material portions of the evidence, and the cases cited upon the argument, fully appear in the judgment.

Dalton McCarthy appeared for the petitioner.

William Boys for the respondent, Henry Leigh.

Gwynne, J.—In *Re Taylor*, 11 Sim. 178, which was one of the first cases that arose under the English Act, 2 & 3 Vic. cap. 54, it appeared that on the 20th October, 1837, Mrs. Taylor left her husband's house, alleging, in justification of that step, a charge of adultery, which she then preferred against him, upon grounds of which she afterwards admitted the entire insufficiency, and which were, in fact, wholly without foundation. Overtures for a reconciliation were immediately made by Mr. Taylor, and various negotiations followed; but Mrs. Taylor, by the advice of her friends, refused to return home. Circumstances occurred which convinced Mr.

* See *In re Kinn*, 6 C. L. J. N. S. 96, and the judgment of Adam Wilson, J., in *Re Allen*, Q. B. H. T., 1871 (not yet reported).—Edw. L. J.

C. L. Cham.]

IN THE MATTER OF SOPHIA LOUISA LEIGH.

[C. L. Cham.]

Taylor that his wife's affections were alienated, and that no *bond fide* reconciliation could be expected; and he went to reside in France. Afterwards, in July 1838, Mrs. Taylor instituted a suit in the Consistory Court of London for restitution of conjugal rights. To this suit Mr. Taylor put in an allegation in bar, stating the circumstances under which his wife had left his house, and the charge she had made against him; and adding, that although she well knew the charge to be entirely devoid of foundation, she persisted in refusing to retract it. On the 5th February, 1839, the allegation was rejected by the court. Mr. Taylor appealed to the Arches Court, where the judgment of the Consistory Court was affirmed on the 20th June, 1839. He then appealed to the Judicial Committee of the Privy Council, pending which appeal the petition came on to be heard. At the time of the presentation of the petition, there were living five children of the marriage, two of whom were more than seven years old, but the other three were under that age, the youngest having been born on the 23rd May, 1837. The prayer of the petition appears to have been, that Mrs. Taylor might have access to her children.

For the petitioner, Mrs. Taylor, it was contended that the intention of the Act was to create a right in the mother to which the court should give effect in all cases of separation between husband and wife where the wife had not been guilty of criminal conduct: that the clause in the Act pointing out the criminality of the mother as the only cause which should exclude her from the benefit of the Act, distinctly recognized her general right in cases where no criminality could be imputed: that the Act created a positive right of access in the mother, which the court could not deprive her of: that the court was merely the instrument appointed by the legislature to put her in possession of her right: that it was the right of every innocent mother living in a state of separation from her husband; and that the discretion of the court was to determine the manner only in which the right was to be enjoyed, not to take it away: that the interest of the children was the only consideration which could be allowed to interfere with the mother's right.

The Vice-Chancellor of England, however, was in that case of opinion that the jurisdiction given by the Act was to be exercised solely in the discretion of the court; and that, pending the question in the Ecclesiastical Court, it would not be right for the court to say that Mrs. Taylor was entitled to have access to her children. Moreover, he was of opinion that the fact of her having, without cause, removed herself from her husband, was a sufficient reason why the court should not exercise the jurisdiction of ordering any access. Accordingly, no order was made on the petition.

In *re Bartlett*, 2 Col. 661, was an application under the Act, praying the delivery to the mother of two of her children, a boy and a girl under seven years of age, the girl being only two years of age; and that she might have access to her other children, four in number. It appeared that the wife's family had brought about an unhappy state of existence between the husband and wife; that on one occasion he had separated

himself from her, and on returning to his house struck her; that he had been bound over to keep the peace towards her; and that he had, both in words and in writing, expressed himself towards her in a very violent and offensive manner. In giving judgment, the Vice-Chancellor held that the statute did not, as a condition of the interference of the court, require that the wife should have obtained or should be entitled to obtain a divorce *a mens et thoro*. "This," he said, "is a case in which the husband and wife are living apart from each other" (her brothers having removed her from his house), "her husband appearing to wish, and the wife objecting to, a reunion." He says also, "That she is clearly legally justified in living apart from him, it would be imprudent for me, upon the evidence before me at present, to say; but if she is not so, that she is not without excuse, not without apology, may, I think, be safely stated." He accordingly made an order for the delivery to the mother of her youngest child (two years of age), Mrs. Bartlett's two brothers undertaking for the proper care, maintenance and education of the child while in her custody. The order also made provision for her having access to the other children, and for access for the father to the youngest child so removed into the custody of the mother; and it was ordered that this child should not be removed from the house of Mrs. Bartlett's brothers without the leave of the court.

In *re Fynn*, 2 DeG. & Sm. 457 (A D. 1848), was not a petition under the Act, and no order was made upon the petition for the want of a sufficient provision being made for the care, maintenance and education of the child, if the father should be deprived of his common-law right of possession and control of his children. In that case, however, the facts were such as seemed to justify the wife in living apart from her husband, for Knight Bruce, V. C., says, "I am not persuaded, however, that she has not a good defence to the pending suit, if there is one pending, or to any suit against her for restitution of conjugal rights."

In *Re Tomlinson*, 3 DeG. & Sm. 371, no order was made, for a reconciliation took place while the petition stood over to enable the wife (the petitioner) to answer the affidavit filed by the husband. Knight Bruce, V. C., in this case also seemed to regard the mother's right as dependent upon her being justified in living apart from her husband; for he says there, "I should have thought it right now to make an order relating to the custody of the infant, without directing the petition again to stand over, had there appeared to me to be a probability of the mother's success in the ecclesiastical suit, that is to say, in establishing that she is justified in living apart from her husband." The husband had instituted a suit for the restitution of conjugal rights, and the case had stood over for the purpose of enabling counsel from the Ecclesiastical Court to argue the case upon the validity of the mother's defence to that suit; at the close of which argument the learned Vice-Chancellor made the observations above quoted.

In *Ward v Ward*, 2 Phill. 786 (A D. 1849), the wife obtained a decree *a mens et thoro*, and the order was made on her petition. Lord

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Cottenham has there enunciated his opinion of the object of the Act. He says: "I must say something with regard to the position of the children under the late Act of Parliament, as to the construction of which, and the object with which it was introduced, some very erroneous notions appear to exist. The object of the Act, and of the promoters of it, and that which I think appears upon the face of the Act itself, was to protect mothers from the tyranny of those husbands who ill-used them. Unfortunately, as the law stood before, however much a woman might have been injured, she was precluded from seeking justice from her husband, by the terror of that power which the law gave to him, of taking her children from her. That was felt to be so great a hardship and injustice, that Parliament thought the mother ought to have the protection of the law with respect to her children up to a certain age, and that she should be at liberty to assert her rights as a wife without the risk of any injury being done to her feelings as a mother. That was the object with which the Act was introduced, and that is the construction to be put upon it. It gives the court the power of interfering; and when the court sees that the maternal feelings are tortured for the purpose of obtaining anything like an unjust advantage over the mother, that is precisely the case in which it would be called upon and ought to interfere."

In *re Halliday, Ex parte Woodward*, 17 Jur. 56, came before Turner, V. C., in 1852. That was the case of a petition under the Act, presented by the mother, praying for the custody of her infant child, four years of age. It appeared that the husband and wife had lived happily enough together until about a year previously, when a legacy of £540 had been left to the wife, which, it was alleged, the husband had since squandered in dissipation. The money being all gone, and his wife becoming chargeable to the parish, he was taken up for deserting his wife, convicted, and sentenced to six months' imprisonment. Shortly after coming out of prison, he made his way, in the absence of his wife, to the lodgings where she was living and maintaining herself by going out as a laundress, and took away their child. He refused to state what had become of it, except that it was at board in Essex. By the affidavits filed in the matter, each accused the other of habitual drunkenness, and in addition the wife accused the husband of adultery.

In relation to the Act and its object, the Vice-Chancellor says: "It will necessarily be important, in the first place, to look at the principles upon which the Act proceeds. When this Act came into operation, it was the undoubted law of the country that the father is entitled to the sole custody of his infant children, controllable only by this court (the Court of Chancery) in cases of gross misconduct. With this right the Act does not, as I understand it, interfere so far as to have destroyed the right; but it introduces new elements and considerations under which that right is to be exercised. The Act proceeds upon three grounds: first, it assumes and proceeds upon the existence of the paternal right; secondly, it connects the paternal right with the marital duty, and imposes the marital duty as the condition of recognizing the paternal right; thirdly, the act regards the interest of the child. These

three grounds, then—the paternal right, the marital duty, and the interest of the child—are to be kept in mind in deciding any case under this statute." He then cites *Warde v. Ward*, in confirmation of his view, and says, "I think there is a very great difficulty in calling on the court to restrain a man in the exercise of his legal right. * * * There are, however, two grounds on which the court has jurisdiction under the Act, viz., breach of marital duty, and the interest of the child. That the husband did desert his wife previously to May, 1851, he does not deny; but he justifies the desertion as necessary. It is, therefore, incumbent upon me to look into the conduct of the wife. The charge against her is that of habitual drunkenness." The Vice-Chancellor, upon the evidence, came to the conclusion that this charge was not proved; and, referring to the conduct of her husband taking away her child from his wife's lodgings, and to the fact that he did not even inform the court where the child was, except that it was at board in Essex, he proceeds: "Is it, or is it not, in contravention of the marital duty, which the Act has placed in competition with the paternal right, that the husband should thus take away his children and keep them, without any communication with the mother as to the mode, or place, or circumstances of their maintenance? The natural right must be held to have been modified by the Act, and the same opportunities must now be given to the mother as to the father, of communicating with the offspring. Then there is to be considered the question of access only, or of custody of the child; and that depends upon what is most for the interest of the child in the position of the parties." And finally, he says: "But I shall decide, if possible, rather in favour of the paternal right than against it; and I therefore give now an option to the father to place his child to be taken care of where the mother can have access to it, and see that it is properly attended to, so that she may have the benefit intended by the Act. Unless it be shown by affidavit on the next seal day that this has been done, I shall direct the child to be delivered over to the mother."

In *Shillito v. Collett*, 8 W. R. 683 (A.D. 1860), the application was by the mother against the testamentary guardians of the children, appointed by her husband's will, for the custody of three children, all under seven years of age. The observations of Kindersley, V. C., in that case, are to be taken as applying to the particular circumstances of that case, which from its nature raised no question arising out of the fact of a husband and wife living apart. The stress which he lays upon the interest of the children being the point to decide the case, must be limited to the case before him. This sufficiently appears to be the intent of the learned Vice-Chancellor, from the context of his judgment; and it is therefore by no means an authority for the position, that in the case of separation between husband and wife, the cause of separation is to be overlooked, and that the sole point for consideration is the benefit of the children. He says, there, "Beyond all doubt, if it had not been for Mr. Justice Talfourd's Act, the guardians could have assumed the conduct themselves of the education and maintenance of the children; but

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under the statute, the court has the discretion, either against the father or the testamentary guardians, as in this case, where any of the children are under seven years of age, if it sees fit, to decide that the custody shall be given to the mother, although she was not appointed guardian. With respect to the age of the children, the Legislature considered that as between the guardian and the mother, the very young children required a mother's nurture; and, notwithstanding the legal rights of a father, they should be entrusted to her. But it still enabled the court to do that which it thought best for the interest of the children. It did not consider that, as between the father and mother, the father had an equal interest with her, but that in the majority of cases the custody should be given to the mother; but, under ordinary circumstances, it was most desirable that it should be entirely discretionary in the court." In the exercise of that discretion, the Vice-Chancellor was of opinion that he "must look at the interest of the children, which might be just as well preserved by giving the custody either to the father or the mother, the tendency being to lean towards the mother when the children were of very tender age; but still the material question was, what was for the children's benefit?" He then proceeds to show why, in that case, he thought the discretion of the court would be best exercised by leaving the children in the custody of the testamentary guardians. There is nothing in this case which countenances the idea that the learned Vice-Chancellor intended to cast any doubt on the propriety of the observations of Lord Cottenham in *Ward v. Ward*; of Turner, V. C., in *Re Huldway*; or of the Vice-Chancellor of England in *Re Taylor*, in a case where husband and wife were living apart.

In *Re Winscom*, 11 Jur. N. S. 297 (A.D. 1865), the application was by the mother for access to her female child eight and a half years old; but the principle upon which the right of access and custody depends is the same. In that case the husband had petitioned the Divorce Court for a divorce upon two allegations of adultery, one of which was condoned and the second not established, and so the petition for divorce was dismissed, but the husband and wife lived apart. Wood, V. C., in that case, rests upon Lord Cottenham's decision in *Ward v. Ward*, as establishing the intention of the Act, and the course of the court in relation to it; and applying these observations to the case before him, after stating the circumstances under which the husband and wife were living separate, he says, p. 299: "The consequence is, that they are not separated from the matrimonial tie; but it could not, as I apprehend, be with any great hope of success suggested, that the lady is in a position to institute any suit for restitution of conjugal rights. Nothing of the kind is suggested, and they must for the present remain apart." And again: "But further, I have had to consider most seriously how far it would help her for me to interfere at all with the father's directions in a case circumstanced like the present. In the first place, it is not clearly a case in which, according to Lord Cottenham's view, the court is called upon for any interference whatever. It is not a case in which, to use Lord Cottenham's expression, the

mother requires protection from the tyranny of her husband."

Our Act, Con. Stat. U. C. cap. 74, sec. 8, is identical with the Imperial statute 2 & 3 Vic. cap. 54, with the exception that in our Act the age of twelve years is substituted for seven years, and that the jurisdiction which the English Act confers on the Lord Chancellor and Master of the Rolls is by our Act conferred upon the Superior Courts of Law and Equity, or any judge of any of such courts.

From all of the above cases, the true principle to be collected, I think, is, that the court or a judge, in the exercise of the discretion conferred by the Act, is bound to recognise the common law right of the father, and should not assume to impair or interfere with that right, so long as the father fails not in the due discharge of his marital duties. In order to induce the court to interfere on behalf of the wife, she should satisfy the court that the separation, if the act of the husband, is in disregard of his marital duties, that is, without sufficient cause given by the wife; or, if the act of the wife, that, although she may not have cause sufficient to entitle her to a decree for judicial separation, she has reasonable excuse for leaving her husband and living apart from him: and further, that it should not appear that it is not the interest of the children that she should have access to them, or the custody of those under the age mentioned in the Act in that behalf. The object of the Act being to protect wives "against the tyranny of husbands who ill-use them," a wife can have no right under the Act, who should capriciously or without some reasonable excuse, desert her husband, absent herself from his home, and abandon her duties as a wife and mother. In view of these principles, it will now be necessary to enquire whether the petitioner in this case brings herself within them, so as to entitle her to the interposition of the jurisdiction conferred by the Act.

It is difficult to conceive anything more contradictory than the statements contained in the affidavits of the wife, her mother, and of Margaret McKay, on the one side, and in the affidavits of the husband and others, filed upon his part, in the material points. By the affidavit of Mrs. Leigh it appears that she and Mr. Leigh have been married for ten years; and she alleges that for the last eight years her husband has been in the habit of abusing, insulting, and maltreating her in the most shameful manner, not only in vituperative language, but also by inflicting upon her grievous bodily injury; and she says that to such an extent has he carried his cruelty towards her, that frequently, through the effect of his brutal treatment of her, she has been so ill that her life has been despaired of; and that whilst so ill, her husband manifested such perfect indifference as to her condition, and so neglected her, that she had to apply to her mother for her care and protection, and even for the common necessities of life; and that finally, from the continued and constant ill-treatment she received from her husband, and being pregnant of her youngest child, and being apprehensive of danger to its life and to her own, she, in pursuance of the advice of her physician, left her husband's house in April, 1870, taking with her her three children, now aged nine, eight and four years respec-

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tively, and has since continued to reside with her mother. The affidavit then alleges that the father, on the 6th April, 1871, succeeded in getting possession of her child of four years of age, and in taking it away; and avers that since it was so taken away, the mother has never seen the child, nor does she know of its whereabouts. The affidavit then proceeds to allege that two of the husband's brothers have for a long time been subject to fits of insanity, and that the wife, from her husband's treatment of her, and his general demeanor, has no hesitation in saying that he is, and for some time has been, subject to fits of insanity; and that she has no doubt he was under the influence of one of such fits when he took away his child, on the 6th April last: and it alleges that the mother is well able to supply all the wants of the children.

Now, the first observation which strikes one upon the perusal of this affidavit is, that it is strange that no single particular instance is given of the ill-treatment, which it is said has continued for a period of eight years, during which the life of the wife, in consequence of such ill-treatment, was frequently despaired of. If the husband is one of a family long afflicted with fits of insanity, and if he himself, as is alleged, has been subject to such fits, and under the influence of them has, for a period of eight years, in the midst of a civilized community, treated his wife, in the language of her mother, "more like a brute than a natural creature;" and if, in consequence of such treatment, the wife, acting upon the advice of her physician, found it necessary to leave her husband's house, and fly with her children for protection to her mother, surely abundant and indisputable evidence could be adduced of the truth of the charges. The only evidence, however, which has been offered, is that contained in the affidavits of the wife, her mother, and the hired servant now living with them, and who, it appears, did at one time live with Mr. and Mrs. Leigh for about four months, in the year 1868.

The husband, in his affidavit, contradicts, in as express terms as is possible, the general charges made against him; and he states matters which are wholly uncontradicted, and which, being uncontradicted, I should be obliged, even though not confirmed, to treat as true upon this application, but they are confirmed in most important particulars by the affidavits of other persons. These affidavits appear to establish that reliance cannot be placed on the affidavits filed by the petitioner, upon the essential points offered to evoke the jurisdiction conferred upon me by the statute.

Leigh, in his affidavit, after extracting the material allegations from the affidavit of his wife, says that there is not a word of truth in any of such statements: that he has never in any way abused or ill-treated his said wife or any of his children, and that she left him entirely without cause: that he and his wife lived always on good terms up to the time she left him, and that when she did leave him it was without any previous misunderstanding whatever: that she had asked him to drive her and the little girl (the custody of whom is now in question) out to her mother's, and to let her stay two or three days, and that he did so; and that on leaving her at her

mother's, it was arranged between him and his wife that he should take them back home on the following Sunday: that accordingly he went for them on the Sunday, but that his wife's mother said they had better not return that day, it was so very cold: that he then returned without them, and without any suspicion whatever that his wife did not intend to return to him, he having parted with her then on the best terms: that previous to his leaving on that occasion, it was arranged that Mrs. Bull (his wife's mother) should drive his wife and child home: that having waited for a week without their returning, he went over to Mrs. Bull's again, and then asked his wife if she was going to forget him altogether, to which she made no answer; and that then, for the first time, he saw that there was something wrong; and that he had again to leave the mother's house and return home without discovering what was the matter, or what his wife intended to do: that on the next day he again went to see his wife, and found her at Mr. Steele's house; that she at first hid from him, but that on his asking for her, she came out and shook hands with him: but on talking to her there, she at last told him she did not intend returning to her home: that he returned home alone, and that shortly afterwards Mrs. Leigh got possession of the other two children by taking them on their way home from school. He then proceeds to contradict the several other charges made against him; and after retorting charges against her in relation to her temper and ill-treatment of her children (which is much to be regretted, as this case cannot be made to depend upon the relative suitability of either to have sole charge of the children), he concludes by saying that he is still and always has been willing and anxious that his wife should return and resume her proper place in the management of his household, and that she keeps away from her home entirely against his will.

This affidavit is accompanied with certificates, signed by about twenty of his neighbours, who have known him for periods varying from ten to forty years, describing him to be a sensible, upright, honest, trustworthy, respectable man, of sound judgment, a good and obliging neighbour, to whose disparagement nothing is known; that he bears the best of characters; and one describes him to be noted as a good husband and kind father—a man of good sense, steady habits, and amiable disposition, and esteemed so by all his neighbours. Mr. John Steele, who has been for thirteen years reeve of the township in which Leigh lives, states on affidavit that he has known Leigh for eighteen years; that during all that time he has always found him to be a temperate, well-conducted man; that he has known the brothers of Leigh also for eighteen years, and that he has never heard of any of them being insane, or subject to fits of insanity; that his brother Leonard, upon the occasion of his wife's death, was much overcome with grief for about a month; and this, as well from Mr. Steele's affidavit as from that of Mr. Simpson, who was Leonard Leigh's father-in-law, seems to be the only foundation for the charge of insanity. Mr. Steele also states that about three years ago Mrs. Leigh was very ill, and was expected to die; and that as she owned some separate property, Mr. Steele

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was sent for to draw her will; and he says that then she spoke highly of her husband, and of his kindness to her—that he had been a good husband and father. He also states that until Mrs Leigh left her husband, her mother, Mrs. Bull, always spoke highly of Leigh, and considered him an excellent man. Mr. Steele also says that he was present at Mrs. Bull's on the day that Leigh's wife remained there on account of the coldness of the weather; and that from the manner of Mr. and Mrs. Leigh to each other, he (Mr. Steele) had no idea she was going to leave her husband, and that he was quite surprised when a short time afterwards he heard that she would not return to him.

A Mr Lawrence, a medical man, states that he attended Mrs Leigh and the family during the years 1867-8-9: that during those years she was twice dangerously ill—once from inflammation of the lungs, and the other time from pleurisy: that during those periods, her husband manifested the greatest concern for her, and paid her the greatest attention, and procured for her everything she required. He adds that he has had many opportunities of judging, and that he has never seen any trace of mental disease in Leigh; that he does not believe there is any; that he is, in fact, a quiet man, and by no means excitable or violent in any way. Then there is the affidavit of a Mrs. Charlotte McCalman, who lived in Leigh's family for upwards of six months in 1868, and during the period that Margaret McKay was there. She describes the conduct of Leigh towards his wife, and also towards his children, as most kind and affectionate; she describes him as a kind husband and father; that he never ill-treated his wife, but was always kind and attentive to her; that he was fond of his children, and they of him. Andrew Home and Charles Morgan describe Leigh as a quiet, sober, industrious man, who holds a very respectable position as a farmer in the township; and say that they have never known or heard of his being insane, or in any way violent or peculiar in temper. Then there is the affidavit of Mr. Simpson, who has known Leigh's family for forty years, and is the father-in-law of his brother Leonard. He says that Henry Leigh, the petitioner's husband, is a kind-hearted man; that he has always been sober and well conducted, and that he does not believe any of the statements to the contrary made by his wife in her affidavit filed in this matter; that in his belief, the wife has no just cause whatever for leaving her husband, and that he believes the trouble between them to be of her own making, under the instigation of her mother; and as to the imputation of insanity in the family and in Henry Leigh, he says he has never known or heard of anything of the kind, and in effect he says the only foundation for the charge is that Leonard Leigh was out of his mind with grief for the loss of his wife for one or two months after her death, but that he got over it, and has ever since been perfectly sane.

Upon the whole, the only conclusion at which I can arrive upon this evidence is, that the petitioner has failed in satisfying my mind that she has had any excuse for leaving her husband's home and deserting her duties as a wife in the manner she appears to have done. Her allega-

tions, and those of her mother, and of Margaret McKay, are contradicted by Leigh himself, as plainly as they can be, having regard to the generality of the charges; and the uncontradicted account which Leigh has given of the manner in which his wife left him and got possession of all his children, so diametrically opposed to the account of the same transaction given by the wife, coupled with the confirmation which I think Leigh receives from the affidavits of the other persons filed by him, forces upon me the conviction that reliance cannot be placed on the statements contained in the petition filed; and that I cannot do otherwise than discharge the application, without incurring the danger of giving rise to a belief in ignorant minds that the duties of the married state are less obligatory upon the wife than upon the husband.

I have not thought it necessary to refer to the mutual charges of unfitness of either alone to have charge of the children, because of the opinion which I have formed that the petitioner has not established such a case as in my judgment warrants my interfering with the paternal right. But in view of the character for sound judgment and amiability of disposition given by his neighbours to Mr. Leigh, and to the character of Christian meekness and gentleness given to Mrs. Leigh by the Rev. Mr. Ferguson and others. I venture to express the hope that both husband and wife will yield to their better feelings, and agree to forget their differences, from whatever cause they may arise, and live together in love and affection; and that Mrs. Leigh will not permit any one to lead her away from the discharge of the duties imposed upon her by her marriage contract; and that she will resume, as desired by her husband, her proper place at the head of his household. If, unfortunately, different counsels should prevail, and if the wife should at any future time be advised to renew this application, I should certainly, if the application should be made to me, require the parties and witnesses to be examined *videlicet* before me, for the purpose of arriving, if possible, at the truth as to the grounds of an alienation which, upon the material at present before me, I am obliged to say appears to me to be causeless.

In the hope of avoiding adding bitterness to the feelings of either of the parties, and of aiding in the promotion of a good understanding between them, I shall discharge the present summons without costs.

Summons discharged.

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IN THE SUPREME COURT.

IN RE THOMAS ARCHIBALD AND JOHN ARCHIBALD, INSOLVENTS.

32, 33 Vic. cap. 16, ss. 105, 106; 34 Vic. cap. 25, sec. 1—*Scope of the amended Act—Retrospective legislation.*

The Insolvency Amendment Act of 1871 (34 Vic. c. 25) is retrospective in its operation, and applies in a case where proceedings commenced under the Insolvent Act of 1869 were still pending at the time the later Act was passed. Therefore, where insolvents who had ceased to be traders before the 1st Sept., 1869, applied for and obtained an order of discharge under sec. 106 of the Act of that year, the discharge was confirmed on appeal to the Supreme Court, the operation of the original statute having in the

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meantime been so extended by the amending enactment as to bring the case within its scope.

[Sup. Ct. N.S.—June 2, 1871.—*Sir W. Young, C. J.*]

Sir WILLIAM YOUNG, C. J., now (June 2, 1871.) delivered judgment as follows:

This is an appeal from an order of the Judge of Probate and Insolvency at Halifax, dated 1st March last, discharging the insolvents under secs. 105 and 106 of the Act of 1869. Their petition set out their assignment of 1st December, 1869, and that more than one year having elapsed from the date thereof, and the petitioners having failed in obtaining from the required proportion of their creditors a consent to their discharge, they applied to the judge to grant such discharge pursuant to the statute. The insolvents were thereupon subjected to personal examination before the judge respecting their dealings, books and liabilities, which extended over three days, and after careful examination, the counsel who appeared for the creditors and against the insolvents, expressed themselves satisfied with the explanations afforded by the insolvents, and acquitted them of fraud in their dealings. Some delay then took place with a view to the legal objection being raised which was urged on the appeal, but which had not been brought before the Judge of Probate, who granted the order of discharge as unopposed. The first hearing on the appeal was had before me at Chambers on the 31st March, when some preliminary objections were taken on the part of the insolvents, which were afterwards withdrawn, and the main question came up on an admission of the insolvents that at the time the Act passed in 1869 they had ceased to be traders. The case of *Surtees v. Ellison*, 9 B. & C. 750, decided in 1829, was then cited, and I looked into the point and was prepared to give judgment, but withheld it at the instance of the counsel, who were negotiating for a settlement. In the meanwhile the Dominion Parliament passed, on the 14th April, the amending Act of 1871, chapter 25, upon which the insolvents insisted at a second hearing on the 26th May, and I am now to consider the effect of both Acts.

The policy of the imperial and colonial legislatures has varied much from time to time, as to the persons to whom the privileges and obligations of the bankrupt laws should extend. The 34 & 35 Hen. VIII. c. 4, passed in 1542, was aimed at all persons who, in the quaint language of the preamble, "craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors their debts and duties, but, at their own wills and pleasures consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity, and good conscience,"—a description which might be applied to a good many bankrupts of the present day. The 18 Eliz. c. 7, and the 21 Jac. I. c. 19, comprehend all persons using or exercising the trade of merchandise and some other trades or professions. By the 6 Geo. IV. c. 16, all persons using certain trades, and doing certain acts, and all persons using the trade of merchandise, shall be deemed traders; and the present Bankrupt Law in England, the 32 & 33 Vic. c. 71, passed in 1869,

extends to non-traders as well as traders, a full description of traders being given in the schedule, while a recent decision* has extended it to peers of the realm.

The Canadian Insolvent Act of 1864, the parent of the present one, applied in Lower Canada to traders only, and in Upper Canada to all persons, whether traders or non-traders. The Dominion Act of 1869 applies to traders only, and this the amending Act of 1871 has somewhat modified.

Under the Act of 1869, I should have held, on the authority of *Surtees v. Ellison*, that a person who had ceased to be a trader at the passing of the Act did not come within it. The trading in that case was before the passing of the 6 Geo. IV. c. 16, and the court were all of opinion that they must look at the statute as if it were the first that had ever been passed on the subject of bankruptcy, and that there was no sufficient trading to support the commission. Lord Tenterden, in stating this result, lamented that a statute of so much importance should have been framed with so little attention to the consequences of some of its provisions. The legislature, he added, cannot be said to be *inops consilii*, "but we may say that it is *magna inter opes inops*." The reasoning of this case has a direct bearing on the Act of 1869, and in my opinion confined its operations to persons who had been and continued to be traders at the time it passed.

We may infer that such was the opinion also of the Dominion Parliament, and that it led, among other things, to the Act of 1871, amending the Act of 1869, the first section of the later Act being as follows: "The first section of the said Act (that of 1869) is hereby amended by adding thereto the following words: 'And persons shall be held to be traders who, having been traders, and having incurred debts as such, which have not been barred by the Statutes of Limitations or prescribed, have since ceased to trade; but no proceedings in compulsory liquidation shall be taken against any such person, based upon any debt or debts contracted after he has so ceased to trade.'"

This is a very comprehensive and a very important provision, peculiar, so far as I know, to our law, and the true construction of which it is of great moment to ascertain. The section I have just cited is not declaratory in its form—it is profes-edly, as it is in fact, an amendment, but an amendment incorporated with the original section, and henceforth forming an essential part of it. Even in statutes distinct from each other, but on the same subject, the several Acts are to be taken together as forming one system, and as helping to interpret and enforce each other—being in *pari materia* they are to be read as one statute. The doctrine as to the retrospective operation of statutes was fully considered by this court in the case of *Simpson's Estate*, 1 Oldright, 817, and had been previously reviewed in the case of *Wright v. Hale*, in the Exchequer, reported in 6 H. & N. 227. We held "that however it may be in the United States, where the constitution expressly con-

* *Ex parte Morris*. In re Duke of Newcastle, L. R. 5 Ch. 172. See 6 C. L. J. N. S. 189.

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demns and forbids retrospective laws which impair the obligation of contracts, or partake of the character of *ex post facto laws*, there can be no doubt that the Imperial Parliament or Colonial Legislatures, within the limits of their jurisdiction, have a more extended authority; and where their intention is to make a law retrospective, it cannot be disputed that they have the power. That intention is to be made manifest by express words, or to be gathered clearly and unmistakably from the purview and scope of the Act. It is a question of construction; and, the Act being its own chief exponent, still the surrounding circumstances are to be looked at."

Applying these principles to the Act of 1871, there can be no question, I think, that it was intended to govern the operation and to enlarge the scope of the Act of 1869, and that all future proceedings in cases of bankruptcy, and the traders to whom it shall apply, must be regulated by it.

The reference to the Statute of Limitations is not strictly within the scope of our present enquiry, but in a matter coming before all the Courts of Probate in our Province, and which will be eagerly discussed, it is not amiss, I think, that I should add, that where the debts of a person who had been a trader before, but had ceased to be so on the 22nd June, 1869, have been barred by the Statute of Limitations, or prescribed, (that is where they are no longer enforceable at law,) such person is not entitled to the benefit of the Act.

Under the facts in this case I am of opinion that the insolvents came within the Act, if it applies to proceedings actually commenced in our courts of Probate, or under appeal in this court.

This is the only question that remains, and several cases in Fisher's Digest, 8281, were cited by Mr. McDonald as bearing on it, on behalf of the insolvents. In *Wright v. Hale* it was held that the 23 & 24 Vic. c. 126, enabled a judge to certify in an action commenced before the passing of the Act. "There is a considerable difference," said Pollock, C. B., "between new enactments which affect vested rights, and those which merely affect the procedure in courts of justice. When an Act alters the proceedings which are to prevail in the administration of justice, and there is no provision that it shall not apply to suits then pending, I think it does not apply to such actions." See the Imperial Act 24 & 25 Vic. c. 26, sec. 5. The same principle is recognized in *Freeman v. Moyes*, 1 A. & E. 838, and in the Admiralty case of *The Ironsides*, reported in 1 Lush. 458. I have already held that the first section of the Act of 1871 must operate as a retrospective enactment, and I see no reason why it should not apply to a pending suit or appeal. To hold otherwise would only oblige the insolvents to commence *de novo*. The case of *Cornill v. Hudson*, 8 E. & B. 429, where it was held that the 10th section of the Mercantile Law Amendment Act did not extend to actions already commenced, and our own decision of the like purport in *Coulson v. Sangster*, 1 Oldright, 677, proceeded mainly on the language of the enactment, and, as I think, do not apply here. I confirm, therefore, the discharge of the insolvents, but as

they have succeeded on a ground which had no existence when they entered their appeal, I must decline giving them costs.

QUEBEC.

COURT OF REVIEW.*

MARTIN V. THOMAS.

Insolvency—Compulsory Liquidation—Official Assignee.

- Held*:—1. That an insolvent under the Act has no legal interest to plead an assignment made by him under the Act, in bar of proceedings on compulsory liquidation.
2. That, in case of an assignment so made to an official assignee, non-resident in the county or place where the insolvent has his domicile, evidence must be adduced by the party pleading such assignment, that there is no official assignee resident in such county, and this notwithstanding that the sheriff, in his return to the writ of attachment, certifies that there is not an official assignee so resident, and that, in consequence thereof, he has appointed a special guardian.
3. That a petition to stay proceedings filed by an insolvent, after the expiration of five days from the demand of an assignment, on the ground that he has assigned to an official assignee, is too late.

[Montreal, Nov. 30, 1870—15 L. C. J. 236.]

This was a hearing in Review of a judgment rendered by the Hon. Mr. Justice Lafontaine, at Aylmer, in the district of Ottawa, on the 18th of June, 1870, maintaining the petition of the defendant to stay the proceedings of the plaintiff in compulsory liquidation, by writ of attachment, under the Insolvent Act of 1869, and quashing the attachment.

The insolvent resided at Bonsecours, in the district of Ottawa, where a demand of assignment was served on him by plaintiff, on the 21st December, 1869.

On the 29th December, 1869, the insolvent made an assignment in notarial form, to Henry Howard, official assignee, residing at St. Andrews, in the district of Terrebonne.

On the same day, the plaintiff sued out proceedings in compulsory liquidation by writ of attachment, at Aylmer.

The writ was served on the insolvent on the 30th December, 1869, and was returned on the 10th January, 1870. And, in his return, the Sheriff certified that there was no official assignee resident within the district of Ottawa, and that in consequence he had appointed a special guardian.

On the 12th January, 1870, the insolvent caused a petition to stay proceeding to be served on the plaintiff, which was filed on the 18th January, 1870. By this petition the insolvent pleaded the assignment to Howard, alleging that there was no official assignee resident in the county or place where the insolvent had his domicile, and that Howard was the nearest resident assignee.

To this petition, the plaintiff filed a general answer on the 16th February, 1870.

No evidence of any kind was adduced in support of the petition, and the parties having been heard before the Judge, he rendered the following judgment on the 18th June, 1870:—

"Considering that, at the time of the execution of the present attachment, the defendant was an insolvent, and his estate and effects vested in

* Before BERTHELOT, J., TORRANCE, J., BEAUDRY, J.

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the hands of an assignee, maintaining the conclusions of the said petition, it is considered and adjudged that the said attachment, and all the proceedings thereunder, be, and the same are hereby set aside and quashed, and further the demands of the plaintiff is hereby dismissed. The whole with costs against the plaintiff," &c.

Judgment of Superior Court reversed.

ENGLISH REPORTS.

POLLARD V. THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND.

Bill of exchange—Custom of bankers—Payment by agent under mistake of facts—Clearing-house system.

A bill of exchange payable at L.'s bank at N. was presented by the agent of the branch Bank of E. at the former bank for payment, the latter bank having discounted the same for P. The bill was presented for payment in the morning, and instead of cash being given for the same, it was marked with the initials of L.'s bank, signifying, according to the usual custom of bankers, that the same would be honoured, and a "credit note" was given to the branch Bank of E. for the same, to be honoured in exchange after the termination of business at four o'clock on the same day, and at the usual daily settlement among the bankers at N. Before four o'clock, however, L.'s bank discovered that the acceptor had stopped payment, and thereupon immediately applied to the agent of the Bank of E. to cancel the credit note given by L.'s bank in the morning. This, however, was refused; but the Bank of E. debited their customer P. with the amount of the bill as unpaid; and, in an action against them by P. for the amount, they (the Bank of E.) being indemnified by L.'s bank.

Held, that on the presentation of the bill for payment, the initialing the same and giving a credit note amounted to more than a mere provisional arrangement made for convenience sake between the bankers, and subject to a subsequent revocation by the parties; that such a recognition of the bill of exchange was in the nature of payment; and that, therefore, the Bank of E. having received payment of the bill, were not entitled to debit the amount thereof against their customer; and that P., therefore, was entitled to recover.

(19 W. R. 1168, Q. B.)

This was a question submitted by special case without pleadings for the decision of the court, and the point in dispute was whether the plaintiffs, Pollard & Co., were entitled to have credit in their account with their bankers, the defendants, at their branch at Newcastle-upon-Tyne, for the amount of two separate bills of exchange for £219 15s. and £276 1s. 10d. respectively, drawn by the plaintiffs upon and accepted by Messrs. John Hopper & Son, millers, of Gateshead, and payable at the bank of Messrs. Lambton & Co., Newcastle-upon-Tyne, and which bills were indorsed by the plaintiffs to, and discounted by, their bankers, the defendants.

The material statements in the special case are fully set out, and the respective arguments for the plaintiffs and the defendants are sufficiently indicated and enlarged upon, in the elaborate judgment of the court set out in *extenso infra*.

Quain, Q. C. (Lewers with him) for the plaintiffs, cited *Chambers v. Miller*, 11 W. R. 236, 13 C. B. N. S. 126; *Warwick v. Rogers*, 5 M. & G. 340; *Thompson v. Gills*, 2 B. & C. 452; and *Gillard v. Wise*, 5 B. & C. 134.

W. Williams, for the defendant, cited *Aiken v. Short*, 4 W. R. 645, 1 H. & N. 210; *Chambers v. Miller* (*ubi sup.*); and *Warwick v. Rogers* (*ubi sup.*).

July 6.—The judgment of the court* was delivered by

BLACKBURN, J.—In this case the plaintiffs were drawers of a bill of exchange, accepted payable at Lambton & Co., bankers, Newcastle the bill had been discounted by the Newcastle branch of the Bank of England, and the question raised is whether the Bank of England are entitled to debit the plaintiffs with the amount as being a dishonoured bill; and upon that again depends the further question, whether what took place at Newcastle amounted to payment of the bill by Lambton & Co. to the defendants, or was merely an expression of an intention to pay the bill, revocable and revoked. Bankers in London, for the sake of economy of cash payments, have established a clearing-house, the details of the practice of which (so far at least as was material to the point then in question) are stated in the special verdict in *Warwick v. Rogers* (*ubi sup.*). The number of bankers and the quantity of business in Newcastle are far less than in London, and apparently are not sufficient to make it worth while to have such an elaborate arrangement, but many of the objects of the clearing-house are effected by an arrangement (described in the special case) by which all the Newcastle bankers have accounts at the branch Bank of England there, and use it as the means of making all payments between each other.

The case is not very lucidly stated, and there was some controversy between the counsel at the bar as to what it really meant.

It is stated in paragraph 6 that the bankers send all cheques of which they are holders, drawn upon other bankers, to the Bank of England for collection; and the statement in the case then proceeds thus: "These cheques are presented by the said branch Bank of England about two o'clock upon the drawee, the total amount ascertained, and a cheque upon the branch Bank of England given by the drawees for the amount, which is then placed to the debit of their account with the Bank of England."

We infer, though it is not stated, that cheques which the Bank of England hold in their own right are treated in the same way; and also, from what is afterwards stated, that bills initialed in the manner stated afterwards, and the credit notes on the exchange account afterwards mentioned are treated in the same way, and that the "total amount that is ascertained" includes the cheques on that banker (designated in the case as the drawee) which the Bank of England holds as collector for the other bankers, the cheques on him which it holds in its own right, the bills initialed by them, and the credit notes given by him, and that the cheque on the Bank of England which is then given is for the aggregate amount of these four sums, and not merely for the amount of the cheques given to the Bank of England by other bankers for collection; but this, though a material part of the case, is not clearly expressed, and was controverted.

The case then proceeds, in paragraph 7, to state, as follows: "Any one of the bankers, not being the Bank of England, who has a bill made

* Cockburn, C.J., Blackburn, Mellor and Lush, JJ.

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payable at another banker's, sends it down in the morning to that banker to see if it is in order, and will be paid; and if it is, the banker at whose house it is payable initials it and returns it to the banker who is the holder; the bills thus initialed are sent by the holder to the Bank of England for collection in the same manner as cheques. No question in the present case arises as to the effect of initialed a bill, and returning it so initialed to the holder, the present bill having been held by the Bank of England itself, and not by one of the other bankers. When the Bank of England itself holds the bill, the practice is that the bill is left with the bankers at whose house it is domiciled, and a credit note is given to the Bank of England. The credit note is also treated by the Bank of England in the same manner as cheques."

The case then proceeds to state that the bill in question was taken on the morning it became due to Messrs. Lambton, and upon presentation, "was, in accordance with the above practice," marked by Messrs. Lambton for payment, and that a credit note was given, indicating that it, with other moneys, was in order for payment, and would be paid, of which note the following is a copy:—

"Newcastle-upon-Tyne, February 24, 1868.

"Credit Branch Bank. Four hundred and ninety-seven pounds 16/10—£497 16s. 10d.

"For Lambton & Co.,

"THOMAS JOHNSON."

From this statement it may be inferred that bills held by the Bank of England are initialed in the same way as those held by other bankers; but in the view we take of the case it is not material whether this is so or not.

The case then in paragraph 9 states that "upon the afternoon of the same day—namely, about two p.m.—the clerk of the said branch Bank of England took all the cheques drawn on Messrs. Lambton & Co. to their bank, together with the said credit note, which was admitted into the total amount, and a cheque upon the said branch bank was handed by Messrs. Lambton & Co. to the said clerk for the amount of the balance due to the defendants." It would seem that the word "balance" is used here in the sense of aggregate of the cheques, initialed bills, and credit notes, and not as indicating that a further account was struck in which credit was given to Lambton & Co. for any cheques or bills payable by the Bank of England of which Lambton & Co. were holders; but this is not clearly stated, and it was in controversy at the bar what was meant. It does not, however, seem to be important to ascertain this, for it is explicitly stated that the cheque was given for an amount which included the credit note representing this bill *inter alia*. After the banks had closed to the public, which is at three o'clock, Messrs. Lambton & Co., for the first time, ascertained that the acceptor of the bill had stopped payment, and that the balance to his credit with them was not sufficient to meet this bill. Of course, if they had known earlier that he had stopped payment they never would have done what they did, and if what they had done was still revocable they would have revoked it; they immediately gave notice to the branch bank that

they had paid the bill in error, and required them to take it back. This was done before four o'clock, but after their account was already debited with the amount in the accounts of the Bank of England.

The question in this cause is, whether they still had the right to do this. If the bill was already paid they clearly had not. If what took place amounted to no more than an arrangement amongst the bankers, by which for convenience sake they, at three o'clock, stated the account of what they at that time intended to pay at the later hour of four, but only provisionally, so that the intention was revocable up to the time of actual payment, it would be otherwise; and if, instead of giving a cheque for the amount, the banker had given a credit note expressing that their account was to be debited provisionally with this amount, but subject to alteration and revocation at their pleasure up to a later hour, it would have clearly indicated that there was such an arrangement. But a cheque given purports to be *prima facie* an absolute payment, and it would require very strong evidence to show that it was not so.

The defendants contended that the 10th paragraph in the case shows that the giving of the cheque had no more effect than a credit note to the effect suggested would have had. That paragraph is in the following terms:—"The banks at Newcastle close to the public at three o'clock, p.m. For the purposes of business between the said branch bank and the bankers at Newcastle, who keep accounts with them, the said branch bank remains open after that hour, and until about four o'clock, when it closes for the day. It is the practice, and was so for many years before 1867, for those bankers to attend at the said branch bank between those hours for the purpose of having the day's accounts between them and the said branch bank investigated, and of rectifying any mistakes and errors of any kind that may have arisen in the course of the day and of finding and striking the final balances between them. All mistakes and errors made in the course of the day are subject to correction during that investigation." We cannot think that this statement has the effect attributed to it by the argument of the defendant's counsel. Where money has been paid under a mistake of fact to an agent, it may be recovered back from that agent, unless he has in the meantime paid it to his principal or done something equivalent to payment to him, in which case the recourse of the party who has paid the money is against the principal only; see *Story on Agency*, s. 800; *Cox v. Prentice*, 3 M. & S. 344; *Holland v. Russell*, 9 W. R. 787, 1 B. & S. 424.

It would obviously be of great importance to a banker, who had by mistake paid money, to be entitled to demand it back from the Bank of England, instead of being obliged to have recourse against the customer of that bank; and full effect is given to all that is stated in paragraph 10 by supposing the arrangement amongst the bankers to be that the Bank of England shall not alter its position by paying over the money to its customer, or doing anything equivalent to payment to him, before four o'clock; but in the present case the payment, if it was one, was not made under such circumstances as

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would entitle the bankers, Lambton & Co., to recover it back: see *Chambers v. Miller* (*ubi supra*).

It is necessary for the defendants to go so far as to maintain that the stating of the account between Messrs. Lambton and the Bank of England, the drawing by Lambton & Co. of a cheque on the Bank of England for the amount, and giving it to the Bank of England, and the placing of that cheque on the Bank of England to the debit of Messrs. Lambton as if they—the Bank of England—had honoured it, were all merely *pro forma* transactions subject to revocation at the pleasure of Lambton & Co., provided they gave notice of that revocation before four o'clock. We cannot think that the statement in paragraph 10 justifies us in coming to that conclusion.

The matter may therefore be shortly put thus: the bill having been presented by the defendants at Lambton & Co.'s, a cheque on the defendants themselves was given by Lambton & Co., who had funds in defendants' hands to cover the amount. Thereupon, unless the giving the cheque was provisional, and subject to ratification on going over the accounts later in the day, it became the duty of the defendants at once to transfer the amount of the bill from the account of Lambton & Co. to that of the plaintiff; and this they in fact did. Such a transaction might no doubt, by arrangement between the bankers, be provisional only and subject to be set aside; but it is for the defendants to show that such an arrangement existed, in order to divest the transaction of what would otherwise be its necessary effect. This the defendants have failed to do, and our judgment must therefore be for the plaintiff.

Judgment for the plaintiff.

DIGEST.

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FOR MAY, JUNE, AND JULY.

(Continued from page 281.)

ABANDONMENT.—See CRIMINAL LAW, 1.
ACCEPTANCE.—See BILLS AND NOTES, 2; CONTRACT, 2.
ACCOUNT.—See PATENT, 5.
ACTION.—See EXECUTORS AND ADMINISTRATORS, 3, 4.
ADJUDICATION.—See BANKRUPTCY, 2.
ADMINISTRATION.—See EXECUTORS AND ADMINISTRATORS.
ADMIRALTY.—See MARITIME LIEN.
ADVERSE POSSESSION.—See BAILMENT; EVIDENCE.
AFFIDAVIT.—See LIBEL.
AGE.

Devise to two daughters absolutely, if they had no children; otherwise, &c. One being fifty-five years and four months, and the other fifty-three years and nine months old, it was ordered that they hold absolutely, on the pre-

sumption that they would not have any children.—*In re Widow's Trust*, L. R. 11 Eq. 408.

See ILLEGIMATE CHILDREN, 1.

AGENCY.—See PRINCIPAL AND AGENT.

AGREEMENT.—See CONTRACT.

AMALGAMATION.—See COMPANY, 2, 3.

AMBIGUITY.—See LEGACY, 1.

ANNUITY.—See HUSBAND AND WIFE; LEGACY, 8; RESIDUARY ESTATE.

ANTICIPATION.—See HUSBAND AND WIFE.

APPOINTMENT.

Property was settled on trusts for A., with power of appointment jointly with B., said power and trusts being subject to forfeiture by certain acts. A proviso followed that A. might by deed or will, executed prior to determination of the trusts, appoint in favor of his wife. A. appointed by will, committed an act of forfeiture, and died. *Held*, that the will did not come into operation until the death of the testator, and the appointment was void.—*Potts v. Britton*, L. R. 11 Eq. 433.

See POWER; TRUST.

APPORTIONMENT.

1. A claim against a testator's estate was compromised by payment of a gross sum several years after testator's death. *Held*, that as between tenants for life and remainder-men under the will, such sum was to be treated as composed of a principal debt due when said claim accrued, with interest thereon to date of testator's death, which two sums were to be charged against the *corpus*. Interest from testator's death on such aggregate principal and interest was to be charged to tenants for life.—*MacLaren v. Stainton*, L. R. 11 Eq. 382.

2. A testator bequeathed a specific sum to pay off a contingent charge upon his X. estate; and if so applied, then a second charge, created on his Z. estate, to be shifted to his X. estate. A portion only of said sum was applied in paying off the charge on the X. estate. *Held*, that the condition was not apportionable, and none of the charge on the Z. estate was to be thrown upon the X. estate.—*Caldwell v. Cresswell*, L. R. 6 Ch. 278.

See TENANCY IN COMMON.

APPROPRIATION OF PAYMENTS.

A. was indebted to B. on three accounts, on one of which a judgment was obtained creating a charge on A.'s lands. A. and B. then entered into an agreement, whereby a smaller sum was to be received from the gross amount of the three demands, payable in instalments; and on failure to pay an instalment, B. to be re-mitted to his original rights. A. paid one instalment, and failed to pay further. *Held*,

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that B. must apply the instalment received to the three debts ratably, and not to one of the unsecured debts only.—*Thompson v. Hudson*, L. R. 6 Ch. 320. See L. R. 2 Ch. 255; 4 H. L. 1. ASSIGNMENT.—See DEVISE, 1, 9; VENDOR AND PURCHASER, 2.

BAILMENT.

A bailee of goods converted them without the knowledge of bailor, more than six years before action brought, but subsequently refused to deliver less than six years before action brought. The bailor brought detinue. *Held*, that the Statute of Limitations ran from the date of demand and refusal to deliver, not from the date of the conversion. *It seems*, the bailor was entitled to sue either for a wrongful parting with property, or wait till the bailee refused to deliver on request. Otherwise, if the action had been trover.—*Wilkinson v. Verity*, L. R. 6 C. P. 206.

BANKRUPTCY.

1. Action in England upon a judgment obtained in Canada, and second action upon a contract made and to be performed in Canada. Plea to both actions, discharge under the English Bankruptcy Act. The discharge was after the cause of action in each case arose, but before the judgment. *Held*, that the discharge was no defence to the first action, on which the judgment was conclusive, though the discharge might have been set up as a defence to the action in Canada; but that the second action was barred, as a discharge in England was binding upon her colonies.—*Ellis v. M'Henry*, L. R. 6 C. P. 228; 7 C. L. J. N. S. 162.

2. Under the English Bankruptcy Act it was *held* that a judgment creditor who seized goods under execution, but had not actually sold, before adjudication of bankruptcy, was entitled to sell the goods and retain their proceeds.—*Slater v. Pinder*, L. R. 6 Ex. 228.

3. A., owing a banking firm a certain sum, became bankrupt. A.'s trustee paid into the banking firm, £865 in trust for the creditors. The said firm became bankrupt, and subsequently A.'s bankruptcy was annulled. *Held*, that the property in the £865 reverted to A., as if it had never passed from him, and that he could set off that sum against the amount he owed the banking firm.—*Bailey v. Johnson*, L. R. 6 Ex. 279.

See SET-OFF; SPECIFIC PERFORMANCE.

BILL OF LADING.

1. A bill of exchange was drawn upon the plaintiff against a bill of lading, and was presented to him for acceptance by a bank, with

the memorandum, "The bank holds bill of lading and polley for 251 bales of cotton, per William Cummings." Plaintiff accepted, without asking to see bill of lading, and paid the bill before due. The bill of lading turned out a forgery. *Held*, that the memorandum did not amount to a guarantee by the bank that the bill of lading was genuine, and that the equities between the parties were equal.—*Leather v. Simpson*, L. R. 11 Ex. 398.

2. B. bought cotton for A., at his request, and B. transmitted a bill of lading and invoice thereof to C., his correspondent. The invoice, a duplicate of which was sent to A., described the cotton as shipped "on account and risk of A." C. sent A. the bill of lading, with a bill of exchange drawn upon him; and A. returned the bill of exchange unaccepted, but retained the bill of lading. C. stopped the delivery of the cotton to A. *Held*, that accepting the bill of exchange was a condition precedent to the right to hold the bill of lading, and that in this case the cotton remained the property of B.—*Shepherd v. Harrison*, L. R. 5 H. L. 116; s. c. L. R. 4 Q. B. 196; 498.

See FREIGHT; SET-OFF.

BILLS AND NOTES.

1. A company had power to issue "bonds, obligations, or mortgage debentures," to be sealed and registered; also, "to make, draw, accept, or endorse any promissory note, bill of exchange, or other negotiable instrument." The company issued instruments headed "£20. Debenture Bond," promising "to pay to the bearer" the principal, with interest, and sealed with the seal of the company. Interest coupons were attached, headed, "Debenture Bond, No. , for £20. Interest Coupon, No. ." *Held*, that the instruments were promissory notes.—*Ex parte Colborne and Strawbridge*, L. R. 11 Eq. 478.

2. A. sent B., his agent, a bill to be presented for acceptance. B. presented the bill on Friday at two o'clock, and called on Saturday at half-past eleven, business hours closing at twelve, for the accepted bill. The bill, which had been accepted without B.'s knowledge, was mislaid, and B. departed without it. On Monday the acceptance was cancelled. *Held*, that it being the custom of merchants to leave a bill twenty-four hours for acceptance, and such period running beyond business hours on Saturday, B. was not guilty of negligence in waiting until Monday for an answer from the drawee.—*Bank of Van Diemen's Land v. Bank of Victoria*, L. R. 8 P. C. 626.

3. Promissory note as follows: "We, the

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directors of," &c., "do promise to pay," &c., with the company's seal affixed. *Held*, that the directors were personally liable.—*Dutton v. Marsh*, L. R. 6 Q. B. 361.

See BILL OF LADING; CONTRACT, 8; PARTNERSHIP; SET-OFF.

BOND.—*See* BILLS AND NOTES, 1, 8; SURETY.

BROKER.—*See* CONTRACT, 2; STOCK EXCHANGE.

BURDEN OF PROOF.—*See* PRESUMPTION.

CARGO.—*See* FREIGHT.

CARRIER.—*See* NEGLIGENCE, 2.

CHARGE.—*See* NONSUIT.

CHARTER-PARTY.—*See* FREIGHT.

CLASS.—*See* DEVISE, 12; PERPETUITY, 1.

CODICIL.—*See* ILLEGIMATE CHILDREN, 1; LEGACY 4.

COMPANY

1. One company agreed to transfer its business to another; the shareholders in the first to become shareholders in the second. Certificates of shares in the second company were sent to the shareholders in the first, with blank receipts therefor. *Held*, that a shareholder in the first company, filling out and returning the receipt sent him, was a shareholder in the second; but a shareholder taking no notice of the communication did not become shareholder in the second company.—*Challis's Case*, L. R. 6 Ch 266.

2. The M. Insurance Co. agreed to amalgamate with the A. Insurance Co., and notice thereof was sent to S., a policy-holder in the M Co., with directions for surrendering his policy and obtaining a new one in the A. Co. S. did not surrender his policy, but on subsequently receiving a notice of an allotment of profits from the A. Co., he accepted a sum allotted to him. *Held*, that S. had adopted the liability of the A. Co. in substitution for that of the M. Co.—*Spencer's Case*, L. R. 6 Ch. 362.

3. F. was a policy-holder in the N. F. Insurance Co., and shareholder in a second company, and both companies amalgamated with a third, which assumed their liabilities. *Held*, that F. became a member of the new company, and lost his claim against the separate assets of the N. F. Co.—*Fleming's Case*, L. R. 6 Ch. 393.

See SHAREHOLDER.

CONDITION.

A company was empowered to sell certain lands, provided it should "first offer the same to the person or persons of whom the same were purchased by the said company." *Held*, that the right of pre-emption was limited to the actual person who sold, and did not extend to such person's representatives.—*Highgate Archway Co. v. Jeakes*, L. R. 12 Eq. 9.

See APPORTIONMENT, 2; CONTRACT, 1; EJECTMENT; MORTGAGE, 8; VENDOR AND PURCHASER.

CONSIDERATION.—*See* SETTLEMENT.

CONSIGNEE.—*See* PRINCIPAL AND AGENT.

CONSTRUCTION.—*See* BILLS AND NOTES, 8; CONTRACT, 8; DEVISE; FOREIGN ENLISTMENT ACT; FORFEITURE; FREIGHT; HUSBAND AND WIFE; ILLEGIMATE CHILDREN, 1, 2; INFORMATION; LEGACY; MORTGAGE; PERPETUITY; POWER; RESIDUARY ESTATE; SHAREHOLDER; SURETY; TAX; TENANCY IN COMMON; VOTER; WILL.

CONTRABAND OF WAR.—*See* FOREIGN ENLISTMENT ACT.

CONTINGENT REMAINDER.—*See* DEVISE, 4.

CONTRACT.

1. A pianist engaged to play on a certain day, but was prevented by illness. *Held*, that there was an implied condition in the contract that illness should excuse her.—*Robinson v. Davison*, L. R. 6 Ex. 269; 7 C. L. J. N. S. 137.

2. Defendant requested his brokers to purchase 100 shares for him. The brokers gave his name as purchaser of a portion of the shares to plaintiff's brokers, and the plaintiff accepted the defendant as purchaser, and made out a deed of transfer, which was accepted for the defendant by his brokers. Defendant subsequently refused to accept the shares. *Held*, that defendant was bound by his brokers' acceptance of the transfer; that purchasing shares in several lots according to custom of the Exchange was necessary and lawful; and that there was privity of contract between plaintiff and defendant.—*Bowring v. Shepherd*, L. R. 6 Q. B. (Ex. Ch.) 309.

3. A wrote to B as follows: "I authorize you to draw upon" me for a certain sum "in drafts at three months' date, which I engage to have renewed three times, by drafts of the same date, making the currency of the credit twelve months in all," you "to furnish me with funds to pay each set of bills previous to maturity, in order to keep this company out of cash advance." B. acknowledged the letter, repeating its terms, but adding to the same the words "for the said twelve months." After which B. added, "We subscribe to the engagement of renewing three times our drafts with furnishing you with funds to pay the drafts renewed, in order to keep you out of cash advance for twelve months." The last set of bills became due a few days beyond twelve months from the time the first set was drawn. *Held*, (overruling judgment of Exch. Ch. and Court of Exch.), that B. agreed to pay each set of bills previous to maturity, not simply to

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keep A. out of cash advance for twelve months.
—*English and Foreign Credit Co. v. Arduin*,
L. R. 5 H. L. 64.

See COMPANY, 2; FORFEITURE; FREIGHT;
MORTGAGE, 2; RAILWAY; SHAREHOLDER; SPE-
CIFIC PERFORMANCE; STOCK EXCHANGE; ULTRA
VIRES; VENDOR AND PURCHASER, 2, 3.

CONTRIBUTION.—See SURETY.

CONVERSION.—See BAILMENT

CONVICTION.—See INDICTMENT.

COSTS.

1. An heir-at-law filed a bill against a de-
visee and executor to set aside a will, and the
will was adjudged valid. *Held*, that the bill
must be dismissed with costs as regarded the
devisee, and that the heir must pay the execu-
tor's costs.—*Banks v. Goodfellow*, L. R. 11
Eq. 472.

2. A wealthy lunatic had made two wills
before he was found lunatic. *Held*, that if
the master should approve the filing of a bill
to perpetuate testimony as to their validity,
such costs of the suit as he should think pro-
per might come out of the estate.—*In re Tay-
leur*, L. R. 6 Ch. 416; *See* 7 C. L. J. N. S. 212.

COURT.

A decision of the Court of Chancery, deter-
mining next of kin to an intestate, will not be
reopened by the Courts of Probate and Divorce
in a suit between parties to the former suit
or those claiming under them. Otherwise of
those not parties.—*Spencer v. Williams*, L. R.
2 P. & D. 280.

See DECREE.

COVENANT.—See BILLS AND NOTES, 1, 3; EXECU-
TION; SURETY; TAX.

CRIMINAL LAW.

1. A woman living apart from her husband,
and having custody of her infant child, left it
at her husband's door, telling him she had
done so. The husband allowed it to remain
from 7 p. m. to 1 a. m. *Held*, that the hus-
band was guilty of wilfully abandoning and
exposing the child.—*Reg. v. White*, L. R. 1 C.
C. 811; 7 C. L. J. N. S. 266.

2. The defendant killed a number of rabbits,
left them in bags in a ditch in the grounds
where killed, as a place of deposit, and subse-
quently returned and took them away. *Held*,
that the killing and taking away were one
continuous act, and the defendant was not
guilty of larceny, but felony.—*Reg. v. Townley*,
L. R. 1 C. C. 815. *See ante* p. 294.

See INDICTMENT.

CUSTOM.—See MORTGAGE, 1.

DAMAGES.—See FRAUDS; ULTRA VIRES.

DEATH.—See PRESUMPTION.

DEBT.—See APPROPRIATION OF PAYMENTS.

DECREE.

In two actions in *rem* for wages, judgment
was taken by default, and the court pronounced
a certain sum to be due, and ordered the same
to be paid. Before a payment a mortgagee en-
tered a *præcipe* for a caveat against payment.
Held, that the court might revoke the order of
payment, and that the mortgagee should have
preference.—*The Markland*, L. R. 8 Ad. &
Ec. 340.

See PATENT, 5.

DEDICATION.

The owners of a field, over which had been a
footway from time immemorial, had also from
time immemorial ploughed up the footway in
such parts as they thought fit, and lifted the
plough over in others. *Held*, that the right so
to plough was not inconsistent with the dedi-
cation.—*Arnold v. Blaker*, L. R. 6 Q. B. 433.

DEED.—See POWER.

DEPOSITION.

A reduction to writing of an oral statement
previously given under oath, is a deposition,
though not itself sworn to.—*Reg. v. Fletcher*,
L. R. 1 C. C. 820.

DESCENT.—See CONDITION.

DETINUE.—See BAILMENT.

DEVISE.

1. A. let four houses, and took an assign-
ment to himself of the lease as security for
rent. He subsequently devised "my freehold
houses," giving the numbers of the houses
leased. *Held*, that the mortgage debt did not
pass, but formed part of the testator's per-
sonal estate. The assignment did not merge
the term in equity.—*Bowen v. Barlow*, L. R.
11 Eq. 454.

2. A testator devised to his wife, remainder
to A., but "should A. not survive my wife,
and die without legal issue by marriage," then
to B. The wife died before A., who had no
issue. *Held*, that the devise must be read,
"should A. die in the lifetime of my wife with-
out issue," then to B.; and that consequently
the gift over to B. failed.—*Reed v. Braithwaite*,
L. R. 11 Eq. 514.

2. The Wills Act (1 Vic. ch. 26) provides
that a will shall be construed with reference
to real and personal property, as if executed
immediately before the death of the testator,
unless a contrary intention appear. A testator
devised to A. "all my mansion and estate
called Cleve Court." Subsequent to date of
the will he purchased other land adjoining the
above estate. *Held*, that evidence was admi-

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sible to show what the testator treated as the Cleve Court estate to the time of his death; and that the subsequent purchases passed by the will.—*Castle v. Fox*, L. R. 11 Eq. 542.

4. Devise of a house in trust for A. to receive and take rents, and on A.'s decease in trust for the daughters of A. who should attain twenty-one, or be sooner married, residue of testator's estate over. A. had a daughter, and died before the latter attained twenty-one. *Held*, that the contingent remainder to the daughter was supported by the estate in the trustees; and that the rents accumulated between A.'s death and her daughter's attaining twenty-one formed part of the residuary estate.—*In re Edells's Trusts*, L. R. 11 Eq. 569.

5. Devise of lands in parish of H. to certain parties, "the rest of my freehold hereditaments situate in the parish of H." to S. The first devise was void. *Held*, that the land first devised did not pass to S., the devise to him being specific, not residuary.—*Springett v. Jennings*, L. R. 6 Ch. 333; s. o. L. R. 10 Eq. 488.

6. Devise of "all and singular the estate and mines of Aroa," in trust to sell, and legacies to A. and B., in full satisfaction of any sums due from testatrix. There was also the usual devise of lands held as trustee and mortgagee. The Aroa estate was subject to a mortgage, the money due on which was impressed with trusts for A. and B. *Held*, that A. and B. must elect between the mortgage money and the legacies under the will.—*Wilkinson v. Dent*, L. R. 6 Ch. 339.

7. A testator having two great-nephews, sons of a deceased niece, and also nephews and nieces, devised to his great-nephew A., and to his "great-nephew B., and to such other of my nephews and nieces," &c. In one place the testator called A. his "nephew." *Held*, that "nephews and nieces" did not include great-nephews and great-nieces.—*In re Blower's Trusts*, L. R. 6 Ch. 351; s. o. L. R. 11 Eq. 97.

8. Devise of land without words of limitation to a wife who was made executrix. Testator directed "my executrix" to pay a certain sum to B. annually. *Held*, that the wife took the fee.—*Pickwell v. Spencer*, L. R. 6 Ex. 190.

9. Devise in trust for E., with certain remainders to her children, and ultimate limitation as follows: "and in case every child born or to be born should die under the age of twenty-one years, and without leaving issue, then to the use of the heirs and assigns of E., as if she had continued sole and unmarried;" remainder to heirs of testator. E. had a child

who died, aged twenty-three, after the date of the will, at which date the child was aged sixteen, but before testator's death. E. assigned her interest under the will to the defendant. The plaintiff claimed as heir-at-law of the testator and of E. *Held*, that the ultimate limitation did not take effect; and if it did, yet E. had no power to assign the estate devised, and the plaintiff would take as heir of E. if she had continued unmarried. The rule in Shelley's case did not give E. the fee, Judgment for plaintiff.—*Brookman v. Smith*, L. R. 6 Ex. 291.

See AGE; APPORTIONMENT, 2; HUSBAND AND WIFE; ILLEGITIMATE CHILDREN, 1, 2; LEGACY; PERPETUITY; TENANCY IN COMMON.

DIVORCE.—See JURISDICTION.

DOMICILE.

A British subject domiciled in France, had two illegitimate children by a Frenchwoman, whom he afterward married, when the children were legitimated according to the law of France. *Held*, that the status of the children in England was to be determined by the law of France.—*Skottowe v. Young*, L. R. 11 Eq. 474.

EASEMENT.—See DEDICATION.

EJECTMENT.

Ejectment on a forfeiture for breaches of covenants in a lease. Plaintiff assigned as particulars of breaches a certain act of forfeiture, and failure to pay several quarters' rent since such act. *Held*, that alleging the second ground of forfeiture was no waiver of the first, or affirmation of the tenancy.—*Tolman v. Portbury*, L. R. 6 Q. B. 245; s. o. L. R. 5 Q. B. 288.

ELECTION.—See DEVISE, 6; WILL.

EMBEZZLEMENT.—See INDICTMENT.

ESTATE FOR LIFE.—See DEVISE, 9.

ESTOPPEL.—See COURT; TRUST.

EVIDENCE.

In a wall forming one side of a house belonging to A. was a stone with an inscription stating the wall to be the property of B., and that the ground eighteen feet south from the stone was given to the public for a street. B. had asserted no claim of title for at least thirty years. *Held*, that the fee of the street remained in B., and that A. had not gained a title to the wall by adverse possession. The inscription on the stone was sufficient to prevent such adverse possession arising.—*Phillipson v. Gibbon*, L. R. 6 Ch. 428.

See DEVISE, 3; ILLEGITIMATE CHILDREN, 3; LEGACY, 1; LIBEL; NEGLIGENCE, 1; NON-SUIT; PATENT, 5; PRESUMPTION, LIMITATIONS, STATUTE OF.

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EXECUTION.

A debtor was possessed of a mansion-house and grounds, and a farm, the farm-house on which was distant a mile from the mansion-house; the whole formed one block, with the exception of two fields, one being near the farm, and the other three miles distant, but both being used as part of the farm. A sheriff executed a *fi. fa.* at the mansion-house, informing those in charge that he seized every thing upon the estate, but did no other act of seizure. *Held*, that the goods on the farm were seized, together with every thing on the holding.—*Gladstone v. Padwick*, L. R. 6 Ex. 208; *See* 7 C. L. J. N. S. 262.

See BANKRUPTCY. 2.

EXECUTORS AND ADMINISTRATORS.

1. Testator in his will appointed three executors, one of whom died in testator's lifetime, and a second refused administration. On application to make a residuary legatee administrator with the will annexed, *held*, that administration could not be granted on appearance and consent of the remaining executor: he must either renounce probate or withdraw his appearance.—*Garrard v. Garrard*, L. R. 2 P. & D. 288.

2. The court, notwithstanding consent of all persons interested, refused to depart from the established rule that a grant of administration must be made to the person who is by law entitled to the property.—*In the Goods of Richardson*, L. R. 2 P. & D. 244.

3. Where a widow after her husband's death carried on his business with his tools and material, and thereafter died, *held*, that it was to be presumed she had carried on the business for the benefit of her husband's estate, and that her administratrix *de bonis non* was the proper person to bring an action for the price of the work done.—*Mosely v. Rendell*, L. R. 6 Q. B. 388.

4. Executors carried on testator's business according to directions in his will, but with material which had not belonged to him. *Held*, that as money recovered in the course of the business would be assets of the testator, the executors might sue as such for the same.—*Abbott v. Parfitt*, L. R. 6 Q. B. 846.

FACT, MISTAKE OF.—*See* PARTNERSHIP.

FEE SIMPLE.—*See* DEVISE, 8.

FELONY.—*See* CRIMINAL LAW, 2.

FERRY.—*See* FRANCHISE.

FOREIGN ENLISTMENT ACT

The English Foreign Enlistment Act (33-34 Vic. chap. 90) provides "that if any person . . . despatches any ship with intent . . .

that the same shall be employed in the military or naval service of any foreign state at war with any friendly state," such person commits an offence against the act. "Military service" includes military telegraphy. A company contracted in November 1870, with the French government to lay a series of cables along the coast, which were in fact capable of being connected by land lines, so as to make a continuous line from Dunkerque to Verdon. The company had no purpose of constructing or adapting the line for military use, though it was probable the line would be partially so used. *Held*, that there was no violation of the Act.—*The International*, L. R. 8 Ad. & Ec. 321.

FORFEITURE.

By statute (1-2 Will. 4, ch. 82) a forfeiture is imposed on the occupier of land who shall kill game thereon, where the right to kill has been reserved by the landlord. A tenant agreed that "he would not destroy any game" on a farm, and killed game thereon. *Held* (LUSH, J., dissenting), that the tenant could not be convicted under said statute, as there was no reservation of the right to the landlord.—*Coleman v. Bathurst*, L. R. 6 Q. B. 366.

See EJECTMENT.

FRANCHISE.

By statute the owner of a hereditament, which is injuriously affected by the construction of a railway, is entitled to compensation. The owner of an ancient ferry had his travel diverted by a railway bridge, with a footway for passengers. *Held*, that the ferry was a franchise, and therefore a hereditament, and that the injury to the ferry was the immediate consequence of the erection of the bridge.—*Reg. v. Cambrian Railway Co.*, L. R. 6 Q. B. 422; *See* L. R. 4 Q. B. 820.

FRAUD.—*See* INSPECTION OF DOCUMENTS.

FREIGHT.

The master of a vessel belonging to B. entered into a charter-party with a freighter, acting on behalf of A., to carry 701 tons cargo, to be furnished by A., B. to have a lien on cargo for both freight and dead freight. Bills of lading for 701 tons were signed by the master, and endorsed to A.; but the actual amount received was but 386 tons. There was no other cargo. *Held*, that B. was bound to deliver only the amount of cargo received, and that he had a lien for dead freight, *i. e.*, unliquidated compensation for loss of freight.—*McLean v. Fleming*, L. R. 2 H. L. Sc. 128.

GAME.—*See* FORFEITURE.

GUARANTEE.—*See* BILL OF LADING, 1.

HEREDITAMENT.—*See* FRANCHISE.

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HUSBAND AND WIFE.

The statute 33-34 Vict. ch. 93, enacts that a husband shall not be liable for the debts of his wife contracted before marriage, but "any property belonging to the wife for her separate use shall be liable to satisfy such debts as if she had continued unmarried." An annuity was devised to a woman without power of anticipation. After her marriage, but on the same day, judgment was entered against her for a certain sum. *Held*, that the debt must be paid out of the annuity.—*Sanger v. Sanger*, L. R. 11 Eq. 470.

HIGHWAY.—*See* DEDICATION.

ILLEGITIMATE CHILDREN.

1. Testator gave a share of his property in trust for his niece B. and her husband, "and for the child if only one, or all the children if more than one," of his niece B. And a second share upon such trusts in favor of his niece C. and her husband, and her child or children, as should correspond with the trust for B. There were codicils to the will not affecting the gift. At the date of the will C. was fifty years of age, and fifty-seven at the date of the last codicil. C. had but one child, who was illegitimate. *Held*, that the illegitimate child could not take under the will.—*Paul v. Children*, L. R. 12 Eq. 16.

2. Testator's daughter had married the husband of her deceased sister. Testator devised "to my son-in-law J. C.," and "to my daughter M., wife of said J. C.," and also "to the children or child of my said daughter, M. C." Testator's daughter had two children by J. C., living at date of the will. *Held*, that the daughter's children by J. C. took, although illegitimate.—*Crook v. Hill*, L. R. 6 Ch. 811.

8. On a question of the legitimacy of A., his declarations were offered in evidence; and, *contra*, evidence was offered on the *voir dire* to show A. was illegitimate, and exclude his declarations. At that stage of the proof A. was *prima facie* legitimate. *Held*, that the declarations should be admitted.—*Hitchins v. Eardley*, L. R. 2 P. & D. 248.

See DOMICILE.

ILLNESS.—*See* CONTRACT, 1.

IMPLIED CONDITION.—*See* CONTRACT, 1.

INDICTMENT.

An agent, being bound to pay over weekly the sums he collected, was indicted for embezzlement of a sum due at the end of a week, but composed of several smaller sums collected during the week. *Held*, that there might be separate indictments for each of the smaller

sums, or for their gross amount.—*Reg. v. Balls*, L. R. 1 C. C. 328.

INFANT.—*See* CRIMINAL LAW, 1.

INFORMATION.

On a statute running, "If any person shall," &c., "such person shall" pay a certain sum. *Held*, that an information against two jointly, with subsequent separate convictions, was proper.—*Reg. v. Littlechild*, L. R. 6 Q. B. 293.

See LIBEL.

INFRINGEMENT.—*See* PATENT, 4.

INJUNCTION.—*See* SPECIFIC PERFORMANCE;

TRADE-MARK.

INSPECTION OF DOCUMENTS.

Action on a policy of life insurance; defence, fraudulent concealment and misrepresentation in obtaining it. The plaintiff having shewn that the insurers had charged a special premium, after considering his proposals and reports of his private friends to whom the insurers were referred as to his health and habits, and of a medical man who examined him on behalf of the insurers, the court allowed him to inspect those reports, although the forms on which they were written stated that the insurers would regard the answers as strictly private and confidential.—*Mahony v. Widows' Life Assurance Fund*, L. R. 6 C. P. 252.

INSURANCE.—*See* INSPECTION OF DOCUMENTS.

INTENTION.—*See* POWER.

INVOICE.—*See* BILL OF LADING, 2.

JOINT-TENANCY.—*See* PERPETUITY, 2; TENANCY IN COMMON.

JUDGMENT.—*See* BANKRUPTCY, 1; DECREE.

JURISDICTION.

Plaintiff, in a petition for separation from his wife, was resident in England, and made affidavit that he had no intent to return to his domicile of origin. The court believing the intention to make his domicile in England was not *bona fide*, *held*, that it had no jurisdiction.—*Manning v. Manning*, L. R. 2 P. & D. 223.

JURY.—*See* NEGLIGENCE, 1.

LANDLORD AND TENANT.

The plaintiff hired the ground floor of defendant's warehouse, the defendant occupying the upper story, and a rat gnawed a hole through a gutter in the upper story, letting the rain leak into the house and injure plaintiff's goods. *Held*, that the defendant was not liable.—*Carsstairs v. Taylor*, L. R. 6 Ex. 217; *See* 7 L. C. G. N. S. 181.

See EJECTMENT; FORFEITURE.

LARCENY.—*See* CRIMINAL LAW, 2; INDICTMENT.

LEASE.—*See* LANDLORD AND TENANT; TAX.

LEGACY.

1. A testator bequeathed to a nephew and

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niece by name, and then "to all and every the children of my late nephew M. I. and my niece E. W., share and share alike." In a codicil he referred to, "the legacy left to my niece E. W." The testator's brother M. I. had died, leaving children, one of whom, M. I. having had a son born in England, had gone to America; and the testator knew these facts, but believed that his nephew M. I. was, or might be, dead. *Held*, that the bequest was to the living nephew, and not the dead brother, and evidence of intention otherwise was not admissible. Further, that the gift was to E. W., and not to her children.—*In re Ingle's Trusts*, L. R. 11 Eq. 578.

2. An estate was settled to the use of A. for life, with remainders in tail. A subsequently bequeathed his personal estate in trust for the persons who should for the time being be in possession of the above settled estate, to go with said estate "so far as the rules of law or equity will permit, but so, nevertheless, as that the same chattels personal shall not, as to the effect or purpose of transmission, vest absolutely in any person who" should be entitled to said estate, "unless such person shall attain the age of twenty-one years, or, dying under the age, shall leave issue inheritable." The representatives of B., a remainderman, who had died under twenty-one, without issue male, claimed the personal estate against C., a remainderman, holding the said *real* estate, who was also A's residuary legatee. *Held*, that C. was entitled to the personal estate, either under A's will or as his residuary legatee, and it was unnecessary to decide which. *It seems*, the words "so far," &c., do not make an executory bequest to be executed according to the general intent of the testator.—*Harrington v. Harrington*, L. R. 5 H. L. 87; s. c. L. R. 8 Ch. 564

3. A bequest to A of £50 a year, "out of the interest, dividends, and produce, arising from all my personal property," and after A's death "said £50" to others, is a gift to the latter of a principal which will produce £50 per annum.—*Bent v. Cullen*, L. R. 6 Ch. 285.

4. A testator reciting that he should be entitled to a certain sum in stock, "or the securities or property now representing the same," on the death of his sister, bequeathed "the sum of £2000 consols, part thereof, or a sum equal thereto, to be paid to my son when the same shall be received or got in by my executors." The sister died in 1865, and in 1868 the testator made a codicil reducing the legacy of £2000 consols bequeathed to his

son, but in other respects confirming his will. Before the date of the codicil the testator had sold the principal part of said consols, and sold the remainder before his death. *Held*, that the legacy was specific, and failed, as the fund charged therewith was no longer in existence.—*Oliver v. Oliver*, L. R. 11 Eq. 506.

See DEVISE; ILLEGITIMATE CHILDREN; WILL.

LEGITIMACY—*See ILLEGITIMATE CHILDREN.*

LETTER—*See CONTRACT*, 8.

LEX FORI—*See JUDGMENT.*

LIBEL.

Affidavits that in a newspaper containing a libel, J. S. was stated to be printer and publisher, and that deponent believed him to be such, furnish no evidence of publication by J. S. *It seems* that defects in prosecutor's affidavits on a criminal information for a libel may be supplied by statements in defendant's affidavits.—*Reg v. Stanger*, L. R. 6 Q. B. 352; 7 L. C. G. N. S. 126.

See MARITIME LIEN.

LIEN.—*See MARITIME LIEN.*

LIMITATIONS, STATUTE OF.—*See BAILMENT; EVIDENCE.—American Law Review.*

APPOINTMENTS TO OFFICE.

JUDGE OF THE SUPERIOR COURT—QUEBEC.

THE HON. CHRISTOPHER DUNKIN, of Knowlton, in the Province of Quebec, a Member of the Queen's Privy Council for Canada, and one of H. M. Counsel learned in the Law, to be a Puisné Judge of the Superior Court of Lower Canada, now Quebec, *vice* the Hon. Edward Short, deceased. (Gazetted Oct. 28th, 1871.)

MINISTER OF AGRICULTURE.

JOHN HENRY POPE, of Cookshire, in the Electoral District of Compton, in the Province of Quebec, Esquire, to be a Member of the Queen's Privy Council for Canada, and Minister of Agriculture, *vice* the Hon. Christopher Dunkin.

NOTARIES PUBLIC.

JOHN DONALD McDONALD, of the village of Renfrew, Esquire, Barrister-at-Law. (Gazetted Oct. 28th, 1871.)

JAMES CLELAND HAMILTON, of the City of Toronto, Esquire, Barrister-at-Law. (Gazetted Nov. 11th, 1871.)

CHARLES E. PEGLEY, of the Town of Chatham, Esquire, Barrister-at-Law. (Gazetted Nov. 11th, 1871.)

JOHN TAYLOR, of the City of London, Esquire, Barrister-at-Law. (Gazetted Nov. 11th, 1871.)

HAMNETT PINHEY HILL, of the City of Ottawa, Gentleman, Attorney-at-Law. (Gazetted Nov. 11th, 1871.)

RICHARD THOMAS WALKER, of the City of Kingston, Esquire, Barrister-at-Law. (Gazetted Nov. 15th, 1871.)

FREDERICK FENTON, of the City of Toronto, Esquire, Barrister-at-Law. (Gazetted Nov. 18th, 1871.)

ASSOCIATE CORONERS.

MYERS DAVIDSON, of the Village of Florence, and ANSON S. FRASER, of the Village of Sombra, Esquire, M. D., within and for the County of Lambton. (Gazetted Oct. 28th, 1871.)

THOMAS WHITE, junior, of the City of Hamilton, Esquire, M. D., within and for the County of Wentworth. (Gazetted Nov. 18th, 1871.)

LAST AMENDMENTS OF THE COMMON LAW PROCEDURE ACT.

DIARY FOR DECEMBER.

1. Fri. New Trial Day, Q. B. Open Day, C. P. Last day of determining by Councils of appeal from value of land. Clerk of every municip. except Counties, to return res. rate-payers.
2. Sat. Open Day.
3. SUN. 1st Sunday in Advent.
4. Mon. Paper Day, Q. B. New Trial Day, C. P.
5. Tues. Paper Day, C. P. New Trial Day, Q. B. Last day of notice of trial in Co. Courts. Consolidated Statutes came into force 1859.
6. Wed. New Trial Day, C. P. Open Day, Q. B.
7. Thur. Open Day. Re-hearing Term in Chancery com.
8. Fri. New Trial Day, Q. B. Open Day, C. P.
9. Sat. Open Day. Michaelmas Term ends. Last day for Attorneys to take out certificates.
10. SUN. 2nd Sunday in Advent.
12. Tues. General Sess. and Co. Court Sitt. in each Co.
14. Thur. Grammar and Common School assessment payable. Collector's roll to be returned unless time extended.
17. SUN. 3rd Sunday in Advent.
18. Mon. Nomination of Mayors, Aldermen, Reeves, Co. and Police Trustees.
21. Thur. St. Thomas.
24. SUN. 4th Sunday in Advent.
25. Mon. Christmas Day. Christmas vacat. in Chan. beg.
26. Tues. St. Stephen.
27. Wed. St. John the Evangelist. Nomination of School Trustees in Toronto.
31. SUN. 1st Sunday after Christmas. Last day for School Trustees to make half-yr. report to Loc. Sup.

THE

Canada Law Journal.

DECEMBER, 1871.

LAST AMENDMENTS OF THE COMMON LAW PROCEDURE ACT.

SECOND PAPER.

It remains now to advert to the provisions contained in the last nine sections of 84 Vic. cap. 12.

The 9th section is valuable as defining the law in regard to the exclusion of witnesses, and parties who propose to make themselves witnesses, which had theretofore been in a remarkably fluctuating state. It would be unprofitable to review these changes; it will be enough to state the result of the cases sanctioned by the best judges, in order to manifest that this section is certainly an "amendment" of the law. There was always the right to require that the unexamined witnesses should withdraw from court; but parties could not be ordered out, as long as they behaved with propriety. If either party or witness remained in court after being ordered out by the presiding judge, there was no power to exclude his evidence on that account. All that the judge could do was to observe upon such perversity to the jury, and to recommend them to weigh well the credit

due to testimony given under such circumstances. Reference may be made to the following cases, which contain most of the law on the subject: *Constance v. Brain*, 2 Jur. N. S. 1145; *Parker v. Williams*, 6 Bing. 683; *Attorney-General v. Bulpit*, 9 Pri. 4. The case of *Cobbett v. Hudson*, 1 E. & B. 11, is very instructive; and it shows that at common law the judge had the power to fine a witness for disobeying his order to leave the court. The present Act leaves it to the judge's discretion as to directing the witnesses to go out (see *Taylor v. Lawson*, 3 C. & P. 643), and also leaves the punishment for disobedience to his discretion. It has been urged by some that this section should have declared in express terms that a witness or party refusing to withdraw should be *ipso facto* rendered incompetent to give evidence in the case. This, however, would seem to be involved in the last proviso, if the judge considers it advisable to exclude the testimony of such persons, and probably will answer all the purposes intended.

Section 10 of the Act is framed to get over the ruling of the court in a late case, the reference to which we have mislaid. The same point was held in *McGuire v. Laing*, 19 U. C. Q. B. 508, not cited in the later case; and it is no doubt a provision in furtherance of a laudable desire to shorten litigation.

Section 11, providing for the service of papers on the agents of certain corporations, and defining who are such agents, is a very beneficial enactment, and effectuates to a legitimate extent what was contemplated in section 17 of the Consolidated Common Law Procedure Act. The case of *Taylor v. Grand Trunk Railway Company*, 4 Prac. R. 300, and others of a similar kind not reported, but well known in the profession, show the necessity for such an amendment in the law, in order to avoid the needless expense of effecting service in the common law courts. It would be well if the Court of Chancery were to adopt the provisions of this section, as they have already done, in General Order 91, the clause we refer to of the Common Law Procedure Act.

Section 12, extending for two clear additional days the time for service of pleadings and notices in country causes when the Toronto agent is served, seems to be lessening the expenses of interlocutory proceedings in the suit, *e. g.*, by applications for

LAST AMENDMENTS OF THE C. L. P. ACT.—LAW SOCIETY, MICH. TERM, 1871.

time to plead; and, as to notice of trial and countermand, may be a consequence of the decision of the Court of Common Pleas in *Morell v. Wilmott*, 20 U. C. C. P. 378.

Section 13 carries the amendments beyond the title of the Act, and into the Act respecting Attorneys-at-law. The effect of this change is to limit the reference to taxation of an attorney and client bill of costs to the proper officer of the county where the work was done; and this not only with regard to applications by the party chargeable, but also to those by the attorney himself. The law is also changed in this respect as to solicitors in Chancery. It strikes us that this being so, it will need some rules of court to prevent some very absurd circumlocution that may be devised by ingenious lawyers to bother their adversaries upon the present mode of procedure in reference to taxations before officers in the country.

The taxation of these bills in the outer offices should be final, except in case of appeal to the judge; but at present, by section 331 of the C. L. P. Act, there is the right to have a revision of the bill so taxed in the principal office. The late Judge Burns thought that there should be an order obtained for such revision, but the language of the section is too explicit to permit of such a course of procedure. And the same anomaly may occur in Chancery under General Order 311. After the solicitor and client bill has been taxed by the local master, he is by this order required to transmit the same for revision at Toronto. Of course this is quite a meaningless provision in a contested taxation such as the one in question: the rule was framed for quite a different purpose; yet we understand that the Clerk of Records and Writs has refused to issue execution on the local master's finding of what was due upon such a taxation, because the bill had not been revised at the head office. The possibility of this circuitous procedure will doubtless be remedied either by rule of court or the decisions of the judges of the different courts.

At a recent meeting of the Law Reform Commissioners, Mr. F. C. Draper, Barrister, of this city, the youngest son of the learned President of the Court of Appeal, was appointed Secretary to the Commission. The appointment is a good one, and we heartily congratulate Mr. Draper on his obtaining it.

LAW SOCIETY, MICH. TERM, 1871.

CALLS TO THE BAR.

During this Term, the following gentlemen were called to the Bar:

Messrs. Hector Mansfield Howell, Belleville; William Frederick Walker, Hamilton; Henry Bleecker, Belleville; Duncan John McIntyre, Lindsay; Henry H. Smith, Peterboro'; Daniel McCraney, Bothwell; Allan Cassels, Toronto; Jonathan Brown Dixon, Peterboro'; Henry A. Ward, Port Hope; John Williamson Jones, Brantford; James Henry Burritt, Brantford; Thomas Maitland Grover, Peterboro'; Harry H. Hill, Toronto; John A. W. Hatton, Peterboro'.

The two first gentlemen were not required to pass an oral examination.

ATTORNEYS ADMITTED.

The following were admitted as Attorneys, without oral examination:

Messrs. Duncan John McIntyre, Lindsay; Hector Mansfield Howell, Belleville; Henry Bleecker, Belleville; John Rowe, Guelph; Davidson Black, Toronto; William Macdonald, Toronto; John Badgerow, Toronto; Jonathan Brown Dixon, Peterboro'; Thomas Maitland Grover, Peterboro'; Allan Cassels, Toronto.

And the following gentlemen, after an oral examination:

Messrs. John White, Hamilton; J. Bleecker Powell, Guelph; John H. Metcalfe, Merrickville; Jas. Henry Burritt, Pembroke; James Fletcher, Brampton; John Winchester, Toronto; R. R. Lang, Stratford.

STUDENTS AT LAW.

The following gentlemen passed their primary examination, and were admitted to the Law Society:

UNIVERSITY CLASS.—Messrs. J. G. Robinson, B.A.; George Hughes Watson, B.A.; Michael Kew, B.A.; William Henry McFadden, B.A.; Wm. Rufus Burnham, B.A.; James Hector Brethour, B.A.; Heber Archibald, B.A.; Jas. Stewart Tupper, B.A.; Edwin H. Dickson, B.A.; David Ormiston, B.A.; William Hall Kingston, B.A.

JUNIOR CLASS.—Messrs. Edward Mahon, Andrew Dickson Patterson, Wm. McWhinney, John Denison Lawson, David Steele, Victor Alex. Robertson, Ernest Crombie Mackenzie, Richard Thomas Steele, Frederick Geo. Smart, Thomas Mercer Morton, Silas Carbelle Locke, Richard Dulmage, Geo. Whitfield Grote, John Creighton, Albert Ernest Smythe, John Stock Fraser, John Wallace Nesbitt, T. C. W. Haslett,

LAW SOCIETY.—ELECTION CASES.—CRIMINAL LAW.

Robert Pearson, T. S. Wade, Albert Ogden, Alexander Ferguson and E. S. Malone.

INTERMEDIATE EXAMINATIONS.

Owing to the number of candidates, the oral examination was postponed until Friday, November 25th.

The following passed in the fourth year:
Maximum, 210.

Without an oral:—Messrs. J. Killmaster, 175; Robert Sedgwick, 169; Thomas Langton, 159; William R. Mulock, 157.

And the following after an oral examination:

Messrs. W. Hector, J. B. McArthur, H. J. Macdonald, G. B. Jackson, John McMillan, J. A. Paterson, David Robertson.

The following passed their first intermediate examination:

Maximum, 210.

Without an oral:—Messrs. John Winchester, 200; John Small, 193; E. B. Edwards, 178; H. M. Ellis, 170; Arthur H. Colville, 167; Arthur W. Coleman, 165; W. D. Hogg, 164; John H. Bell, 160; A. S. Ball, 157; A. R. Creelman, 157.

After an oral examination, also—

Messrs. C. W. Ball, A. D. Cameron, S. R. Crickmore, H. M. Deroche, T. D. Grover, John McGregor, C. Egerton Ryerson.

The Scholarships were awarded as follows:
Maximum, 320.

4th Year: Not awarded.

3rd Year: Mr. Barber, Simcoe, 236 marks.

2nd Year: Mr. McMillan, Toronto, 272

1st Year: Mr. F. E. P. Pepler, Toronto, 276 marks.

ELECTION CASES.

We are indebted to Mr. Brough, Barrister of this city, for a report of the trial of the South Grey Election Petition, of which Court Mr. Brough was Registrar. This report has been very carefully prepared, and we think we can safely vouch for its correctness. It is now in type, but want of space prevents our inserting it in this issue.

Mr. Rusk Harris, Barrister and Registrar of the Courts for the trial of the Election Petitions for East and West Toronto, is also preparing for the *Law Journal* reports of those two important cases, which will, we doubt not, be as reliable as that of the Stormont Election Case, also a contribution from him. These gentlemen are thoroughly familiar with the subject, and we are glad to have obtained their assistance in these matters.

We have been requested to announce that Mr. S. R. Clarke, Barrister-at-Law, is publishing a treatise on Criminal Law, as applicable to the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, and Manitoba, which cannot but be most acceptable to the profession. The scope of the work may best be given in the words of the published circular:

"It is intended to cite every *reported* case in the several Provinces, and also the cases in the English Law Reports. These cases have not yet been embodied in any text book. In addition to this, the general design of the author will be to discuss concisely the principles of English Criminal Law, to show how they are modified by our statutes and decisions, and what portions are recognized in such statutes and decisions: to treat of the English Criminal Law prevailing in the several Provinces of the Dominion, the authority for its introduction, and the extent to which it has been introduced: to give a synopsis of every *reported* case in the several Provinces, referring also to Civil cases in which the principles of Criminal Law are incidentally discussed so far as such discussion elucidates the general Criminal Law: to compile a special chapter on extradition from the various decisions on the subject in the several Provinces: to annotate all Canadian Statutes on which decisions have taken place in this country or in England (on analogous Statutes), by giving all English and Canadian decisions thereon. The work will contain about 600 pages, and no Statutes or superfluous matter will be printed. Statutes will be merely referred to by chapter, section, &c. The author has very carefully and thoroughly searched and examined all the reports published in the several Provinces, and has selected therefrom *all* cases which have any bearing on the subject. The decisions of each Province are important in the others, as the Courts are all guided by the light of English decisions, and there is but little conflict between them. It is not intended to touch on the questions of pleading and evidence further than they are developed in the Canadian cases. In other respects, the work will contain everything of importance to be found in the more expensive English treatises."

We have long been hoping to see some competent person undertake what is here promised, and from what we have been told by those who have seen some of the advance sheets, there is every reason to think that Mr. Clarke will do his work well and thoroughly.

LOCAL COURTS, AND THE BOUNDS OF THEIR JURISDICTION.

SELECTIONS.

LOCAL COURTS, AND THE BOUNDS OF THEIR JURISDICTION.

BY MR. SERJEANT PULLING.

We all now admit the value of local courts, and the necessity of bringing home justice to every man's own door. Our surprise is, how the principle could be so long successfully defied; how, in civil cases, the quibbles, and dishonest fictions, resorted to in Westminster Hall, to bring our ancient system of local courts into contempt, could be suffered to prevail; how, for justice administered on the spot, our forefathers could tolerate the gradual substitution of a compound of law, doled out at a distance, at a great cost, in a very pedantic form, and of so very artificial a character as to almost defy the detection of the *simple* justice as one of its ingredients. We are apt to forget, in considering our legal institutions, and the reforms to which they have been subjected, how much of good is derived from a remote period, how much of evil and abuse from that which has intervened. In dealing with the subject of local courts, the innovations that were gradually introduced, the reforms which have been effected, and the reforms which are still needed, it is usual to dwell only on the question of civil jurisdiction, whereas there is hardly anything that is applicable to this part of the subject which cannot, with equal force, be brought to bear on the question of criminal jurisdiction.

The principle of Alfred's Code of Laws was, that all matters, both of civil and criminal jurisdiction, should be disposed of in the locality in which they occurred, by local judges, and by a jury chosen from the immediate locality. If the County Court, before the innovations of the Norman lawyers, was the universal Court of First Instance in civil cases, its other chamber, the Sheriff's Tourn, had a similar jurisdiction in criminal cases. If it was through the subterfuges of Westminster Hall that the old County Court lost its importance as a civil tribunal, it was by means also of its legal subterfuges that its criminal jurisdiction became a dead letter. The usurpation of the civil jurisdiction of the old County Courts by the Courts at Westminster Hall, was not a greater innovation than the narrowing the criminal jurisdiction of the Sheriff's Tourn by a succession of *judge-made laws*, and the substituting for this jurisdiction the authority conferred by the royal commissions of oyer and terminer and gaol delivery, and that much slighter guarantee for judicial efficiency, the mere commission of the peace. We express wonder at this day how such unwarrantable encroachments on the constitution could have been effectually made; how the Legislature could have remained silent or ineffective in dealing with such innovations; how it could be endured that an arbitrary

test of the limit of jurisdiction in civil cases, the amount of 40s., fixed at a time when it represented at least forty times the present value of that sum, should have continued till twenty-five years ago to have been adhered to, in defiance of the notorious changes in the value of money, and how, for the legal recovery of all sums exceeding 40s. it became competent to the suitor, if not compulsory, to resort to the cumbrous, costly, and dilatory machinery of an action or suit in the Superior Courts at Westminster. But it is not the less true that during the 568 years which elapsed between the date of the Statute of Gloucester, and the passing the County Court Act of 1846, the only remedy afforded by the Legislature against the abuses that had crept into our system of administering justice in small debt cases, was the institution by special favour in some towns, of *Small Debts Courts*, of a worse description than the old institutions so unnecessarily laid aside, and rapidly productive of so many evils, that the scant and costly justice of the Courts of Westminster Hall was preferred to the injustice which was so frequently the produce of these eccentric tribunals.

The want of an effectual substitute for the old system of local courts of criminal jurisdiction led, as we all know, to that chaos of legal enactments, giving the jurisdiction of justices of the peace, who, originally appointed as conservators of the peace, came at the whim of every fresh Parliament to have gradually heaped upon them judicial functions more extensive and varied, confused and unintelligible, than perhaps have ever been conferred on any honorary official body of men expected by a fiction of law to understand their duties.

Our system of local courts of civil jurisdiction is now thoroughly established. For the success of this institution we are, if the truth must be told, less indebted to Westminster Hall or the woolsack than to wholesome public feeling, which has given earnest welcome to an institution, essentially good, based on the ancient principles of our constitution, and, after unwarrantable restrictions placed on it by the Courts at Westminster, revived to make up for their shortcomings. It is quite unnecessary to dwell upon the ordeal the institution of our modern local courts had to go through. Bigotry, prejudice, and selfish interests pointed out nothing but evil from the experiment, the spread of a spirit of litigation and extortion, the deterioration of judicial character, the destruction of the Bar, and the legal profession generally; and whilst the sudden creation of such a large number of new judicial offices brought into the field a little army of candidates, it certainly cannot be said that, as a rule, the most eligible were selected. It came to be a practice in Westminster Hall to speak of the County Court Judges with disparagement; stupid anecdotes, illustrating their inefficiency, were circulated, and if, by any subterfuge, the jurisdiction

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of the County Courts could be excepted to, it seemed justifiable and right. Whether, through actual defects in our system of judicial patronage, or the want of confidence which the profession had in the appointments of County Court Judges, these officials were treated for a long time, both in Westminster Hall and St. Stephen's, as if unfit to dispose of any but the simplest cases, involving neither large amounts, complicated facts, or serious questions of law.

The Legislature has now gradually increased the jurisdiction of the County Courts, so as to make them certainly something more than what they were originally called. Small Debt Courts and the salaries of the Judges have very properly been augmented. We have a right to expect that, with the large number of really eligible men who now are said to aspire to the office of Judge of County Courts, the appointments will be henceforth in every way free from objection.

Since the original Act of 1846, the legislation upon the subject of the County Courts has been great; the limit in amount and character of their jurisdiction, legal, equitable, and extraordinary, the powers of the Judges, the sittings of courts, the amount of costs, &c., have all been dealt with, and if we are to credit the *on dits* as to the Judicature Commission, greater changes are impending. We pause now, only to refer to the propositions of Mr. Daniel,* who, in his paper, recently read before the Social Science Congress, seems to propose that the County Courts for the purposes for which they were really called into existence (*viz.*, the adjudication of cases of small debts and demands, and the administration of justice in the immediate district where the dispute arose) shall now cease; and that the courts, instead of being held, as now, at short intervals in the places at present appointed shall henceforth be established at *convenient centres*: several of the smaller courts being done away with, and a very considerable portion of the Judge's work being delegated to the Registrar.

We give Mr. Daniel's propositions in his own words:

"(1st.) A reduction in the number of the courts, by doing away with several of the smaller courts. (2nd.) The power to obtain judgment by default extended to all cases of money demand above 5*l*. (3rd.) The period of limitation for the recovery of debts for shop goods should be considerably reduced, in the spirit of the obsolete though unrepealed Statute, 7 Jac. 1, c. 12. (4th.) The principal registrars to have jurisdiction to hear all cases of contract up to 10*l*. and all cases of tort up to 2*l*. and any cases by consent, with power in special cases to refer the hearing to the judge. (5th.) The registrars should hold frequent courts for these purposes, in some places

fortnightly, in all others monthly. (6th.) There should be an appeal from the registrar to the judge, whose decision should be final. (7th.) The judge should hear and dispose of all other business, with the assistance, when required, of commercial assessors, after the manner of nautical assessors in the Court of Admiralty. (8th.) There should be an appeal from his original jurisdiction to a Divisional Court of the High Court of Justice. (9th.) The Courts of First Instance should be established in the metropolitan districts as well as throughout the country. (10th.) By a re-arrangement of circuits and concentration of courts, the Courts of First Instance should be established at *convenient centres*, and thus a considerable reduction would be effected in the number of judges and registrars—probably one-half of the judges and three-fifths of registrars. (11th.) There should be a power of removal from one Court of First Instance to another for cause shown. (12th.) The procedure and practice of all the courts should be simple and uniform, and the process of each court should run through all. The Court of Probate and Matrimonial Causes might be taken as a model for the procedure and practice of Courts of First Instance. (13th.) The judges should be appointed by letters patent, and *selected for their fitness*, and take rank according to seniority among themselves, and next after the youngest puisne judge of the High Court. (14th.) There should be a chief registrar to each Court of First Instance, an assistant registrar, when necessary, and a sufficient staff of clerks. (15th.) The existing County Court judges, who have served ten but less than twenty years, should be allowed to resign upon pensions equal to two-thirds of their present salaries; those who have served twenty years at their full salary; and the Lord Chancellor should have full power to require any others to resign upon such pensions, (not being less than two-thirds of their present salaries), as he shall deem just. (16th.) The judges and chief registrars should be ineligible for Parliament, but the judges should be eligible for the High Court, and the chief registrars excluded from practice."

Mr. Daniel adds—

"A set of courts established on this basis would, I believe, be more efficient and economical than the present, and the diminution in the number of judges would allow of judicial salaries being paid of an amount which would secure the services of able and experienced lawyers."

These propositions are somewhat startling. It is difficult to see how the number of Judges of County Courts required in 1847, when the limit of their jurisdiction was 20*l*., can now, when that jurisdiction has been so greatly extended and expanded, be reduced, with any security for the work being effectually performed. Mr. Daniel's proposition, in aid of this scheme, that a portion of the present judges' work should be delegated to the registrars, and a number of the courts now held be discontinued, seems open to the most serious objections. There is hardly any judicial abuse more frequently complained of, and more carefully to be guarded against, than that of the judge abandoning to others the work which he ought to perform himself.

* "Local Courts, their Constitution and Jurisdiction," a paper read before the Jurisprudence Department of the Social Science Congress, held at Leeds, October 9, 1871—V. Vernon Harcourt, Esq., Q.C., President—by W. T. S. Daniel, Q.C., Judge of County Courts Circuit, No. 11.

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When we hear with what bitterness suitors in the Superior Courts complain of the injustice done them, by their being driven to refer to arbitration matters which, at great cost, they had submitted for trial in the ordinary course; when we have heard so much of the evil practice too frequently resorted to at Petty Sessions, of leaving much of the work, legally entrusted to the justices, to be dealt with by the magistrate's clerk, how great is the present dissatisfaction of the suitor where the judicial business in a County Court is neglected by the judge, and, as far as the law allows, delegated to the registrar, it is altogether impossible to justify the Judges of the County Courts, being legally allowed to delegate to the registrars so large a portion of their judicial functions as Mr. Daniel here proposes.

The great object of the institution of local courts is to secure the efficient administration of justice as near as possible to the scene of litigation. It would not be tolerated at this early period of the reformed system of County Courts that, under any such pretext as Mr. Daniel affords, the stream of justice should be allowed to flow back from the course of localization to that of centralization—and it is indeed difficult to make out how it would be any compensation to the community for losing the speedy and effectual administration of justice on the spot to have a lesser number of judges sitting in greater dignity, and with more pay, at a distance.

The suggestion that has been of late so frequently made, and is adopted by Mr. Daniel, that the jurisdiction of the County Courts as Civil Courts of First Instance should be extended, is entitled to far more consideration. The number of civil causes tried on circuit is becoming every year smaller. To make the County Court Judges assistant to, if not substitutes for, the judges of assize, in a large number of cases, reducing the number of circuit towns, instead of, as Mr. Daniel suggests, the number of places for holding local courts, would be an unmitigated advantage. The County Courts, with all the defects inherent in a system built up by patchwork legislation, are a valuable institution—let us increase their jurisdiction, but not on any pretence take away the boon conferred on the public of supplying justice in small cases, as in large, speedily and effectually, in the very district where the litigation arises.

The justice now administered in civil cases, however, forms but an inconsiderable part of that which the community require. To really bring home justice to every man's own door it is necessary to look beyond this. The wrongs that are every day suffered, the grievances to be redressed, especially among the humbler classes, can be but ineffectually dealt with by any mere improvement in our forms of action and civil procedure. The complaint may involve a criminal charge, the character, the happiness, the well-being of individuals or of classes, to whom the redress, by a formal

action at law, is a mere mockery. Wherever a criminal charge is involved, the parties who stand as accusers and accused have a more serious issue raised than that which arises in ordinary civil actions. To each of them the dealing with the charge legally, justly, and at once, and on the spot, is of far more importance than the having civil remedies supplied for mere debts or money demands. To the mass of the people the only justice they are accustomed to look to now, is that which is dealt out to them in the magistrates' courts. If the jurisdiction in criminal matters, and in the large range of cases which are now entrusted to the magistrates, were as carefully legislated for as the recovery of debts, the humbler classes would feel more respect for the law, and would more rarely seek to be their own avengers; and the whole community would be altogether more benefitted than by any mere reforms in civil procedure. Is it not practicable to effect reform equally efficacious in the local procedure with respect to the one branch of justice as to the other?—so to reform our system of administering justice in the great range of matters which now come within the jurisdiction of justices of the peace, and in matters of a kindred character, as to make the dealing out law to the masses seem more like the simple administration of justice.

It would be a work of interest to show how the old Anglo-Saxon system of local justice, which in civil cases has in our times been, to a great extent, restored by the revival of the County Courts, and which existed in no less force, certainly with respect to criminal cases, came step by step to give way to innovations, more or less, of Norman growth—how, long after the newer institutions had been generally established, the earlier plant continued to be cherished in our ancient cities and towns, whose charters and ancient customs upheld the privilege of having justice in criminal as well as civil cases administered in local courts; and how, in spite of the spasmodic efforts of the Legislature to provide, by a heap of Statute Law, for the difficulties which the substituted institutions have occasioned, the administration of justice in criminal cases and in our magistrates' courts is still left altogether uncertain, confused, and unsatisfactory. It is not practicable to pursue this topic now—we have only to point out that there seems no good reason which is applicable to the question of reform in the administration of justice in civil cases, which does not, with at least equal force, prevail with respect to criminal cases; no reason why, if the revival of the ancient system of County Courts has answered in the case of the one, a similar reform might not be advantageously effected with respect to the other; why we could not have tribunals of First Instance, for the speedy and satisfactory disposal of the whole criminal business of the country within each of the present County Court districts, as well as the

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County Courts in their present form; why a County Court Judge sitting alone, or as president of the assembled magistrates, could not do all this (with a jury, of course, in those cases where a jury is now required), as effectually as a judge or commissioner on circuit, as the chairman of Quarter Sessions, or a Bench of Justices at Petty Sessions. It would, of course, require the appointment of additional County Court Judges, but if the advantage of this were not deemed sufficient to make up for the cost, the deficiency would be amply made up by the saving in the expenses of trial, and the keep of prisoners waiting to be tried, without taking into calculation the personal cost to prosecutors, witnesses, the police, the complainants, and the accused, under the present system. Were such local courts established, there would be no difficulty in leaving to them not only the jurisdiction now entrusted to magistrates, but in many cases this jurisdiction might be enlarged. A summary jurisdiction and power might with great advantage be given to the Court in many cases where magistrates have now no power. Thus it might with advantage be provided that, in case of a criminal charge, the Court should at once dispose of the question of compensation, for a wrongful accusation, prosecution, or false imprisonment, subject, of course, to appeal in certain cases. In the case of disputes between master and servant it would be a great advantage to give the Court power in all cases to finally adjudicate, without restricting, as at present, the jurisdiction to the case of servants in husbandry. It might also with advantage be entrusted to such courts to deal summarily in case of slander and false accusation, to assess the compensation to the injured person, or to adjust all differences, as in the case of assaults.

The progress of law reform, like the building of the projected Palace of Justice, appears at present to be slow. It may be that the plan of so distinct a change as that here proposed may meet with obstacles—that the institution of an unpaid magistracy is one which, whether it work well or ill, Parliament would hesitate to do away with. There is still a great deal to be done without trenching on such delicate ground.

If we look at the present constitution of our unpaid magistracy, we shall find a great deal which might be remedied, without introducing any serious innovation. The Commission of the Peace for every county, including the names of gentlemen whose legal qualifications consist in the possession of 100*l.* a-year in land, has still the *quorum* clause in it, by virtue of which, in old times, Blackstone informs us, the presence of one of a select number of efficient men was required at every sitting, a requirement which, as he explains, was, and is, evaded by a sort of trick, the names of one and all being repeated in the *quorum* clause. This *quorum* clause is still efficacious in other commissions from the

Crown, as the Circuit Commissions, where the *quorum* is constituted, not of the *grands* named in it, but only of the judges, serjeants-at-law, and Queen's counsel of the circuit. By simply following the same course with the Commission of the Peace, one substantial improvement would be easily effected; and, in truth, very little is required to make our ordinary magistrates' sessions, if not perfect, at least as efficient as tribunals at once exceptional and honorary can be.

There is hardly a single instance where the Commission of the Peace does not contain the names of men with higher legal qualifications than those legally required of, or ordinarily possessed by, the stipendiary magistrates appointed for the metropolis and elsewhere; *e. g.* men who have served as judges of the Superior Courts at home or in the colonies, Queen's counsel and serjeants-at-arms, judges of County Courts, chairmen or deputy-chairmen of Quarter Sessions, recorders of cities, &c. The existing state of the law tends, in a great degree, to discourage such men from acting as magistrates under the Commission.

By the Statutes now in force, no single magistrate (not being a stipendiary) can, alone, transact the ordinary judicial business of a justice of the peace; any unpaid magistrate, whatever his judicial aptitude, is simply placed on a par with the other justices in the commission. If he attends Petty Sessions he may have to sit under a chairman in whom he has no confidence, and find his brother justices wholly depending on the clerk for knowledge of their duties; and yet he may find himself outvoted in the ordinary business and decisions of the court. After such experience, he may probably be induced to absent himself for the future and to leave the magisterial work wholly to the care of those whom he knows to be less competent, who may be very estimable in private life, perhaps even distinguished in society and in public, but who, being without legal education or experience, are necessarily as much out of place on the judicial bench as men without medical education would be to decide cases at a hospital or an infirmary.

By a very easy amendment of the modern legal provisions which have been referred to, the advantage might be gained, of securing, in every district, magistrates at least as efficient and serviceable as stipendiary magistrates, without their cost, and all this without disparagement to other magistrates in the Commission. Thus, on every justice of the peace, possessed of the judicial qualifications already referred to, let there be conferred the powers and jurisdiction now attaching to the office of stipendiary magistrates. Let a return be at once obtained from each county of the names of all persons in the Commission of the Peace so specially qualified, and their names be included in a new commission as presiding magistrates. It might, without any fear of inconvenience, be provided that such presid-

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ing magistrates shall have precedence of all other magistrates, and that one shall act as chairman at every magistrates' court they attend. By a few simple rules as to the time and place of holding Petty Sessions, the attendance of one of such presiding magistrates could always be secured, and thus, without any very radical change, the existing machinery could be made to work till a better were substituted.—*Law Magazine*.

The present deplorable condition of the Bar is illustrated by an application made on Wednesday to Mr. Justice Byles, under the Debtors' Act. A barrister was the debtor, and his Lordship made an order for payment by monthly instalments of £2. On the debtor's behalf it was stated that he had on an average one brief in a twelvemonth—and could not pay £2 a month out of so precarious an income. But to what or to whom is to be attributed the melancholy condition of so many barristers,—for the learned Judge was undoubtedly right when he said that not one in twenty covers his outlay on entering the profession? In the first place numbers of needy men go to the Bar on the merest speculation, without any particular gift of eloquence or special knowledge of law, and what is still more fatal, without connection. Not only this, however, but strange to say, men who both physically and intellectually are unfitted for the practice of the law, crowd the ranks of the Bar. The shortest possible stature is considered no disqualification, whilst woolly-headedness, effeminacy of intellect, defective articulation, and the utter absence of the logical faculty, present no difficulties to the mind of the young aspirant or his guardians. A large number of barristers are, beyond doubt, unsuited in every way to the profession; but, again, many admirably adapted for it are without private means, too frequently have no idea of earning money outside their vocation, and, worn out by the cares of existence, sink into the condition which revealed itself to Mr. Justice Byles. There are, however, hard cases which no foresight could provide against. The increase in the number of barristers, many being the near connections of attorneys, scatters the work already in process of being scattered by legislation relating to County Courts. To such causes is attributable the bare appearance of many a table in the Temple once well covered with profitable business. Sound lawyers of acknowledged capacity and experience are unemployed, and this fact it is to which we would principally call the attention of undergraduates and men already in professions which they desire to leave. A livelihood is not to be got out of sessions where there are, on the average, two counsel to one prisoner, nor out of circuits, save to the favoured few, where there are frequently three times as many (on the Home Circuit we should say ten times as many) counsel as there are causes. London business is in the

hands of a score of prominent men, but the cause lists are slowly dwindling to insignificant proportions. This is no exaggerated description of the present condition of the Common Law Bar, whilst in Chancery, although business there is comparatively plentiful, progress is even more difficult without strong connection. It has been suggested that stringent examinations would have a good effect in thinning the profession. We believe they would not exclude those who hope to live by the profession, but that they would exclude the wealthy, who largely contribute to keep up its social status. There is really no remedy for the existing condition of things but the prompt action of the Legislature in forming local courts, and so giving scope to local Bars throughout the country, and the wise action of tutors and guardians in directing the minds of their charges, not to impossible aims, the realisation of which is reserved to the highly-qualified few, but to useful if subordinate walks of life, in which they may find work suited to their capacities, producing a means of living honourably.—*Law Times*.

CANADA REPORTS.

ONTARIO.

PRACTICE COURT.

IN THE MATTER OF ARBITRATION BETWEEN LEWIS HOTCHKISS AND WILLIAM HALL.

Arbitration—Setting aside—Shewing cause to rule—Misconduct of arbitrator—Reception of improper evidence.

On applications to set aside awards for misconduct of arbitrators, the facts which are relied upon to establish charges of partiality and unfairness on the part of an arbitrator must be clearly averred.

Quere as to right on such application to shew cause on last day of term.

The decision of an arbitrator being binding on the parties in matters of law as well as in fact, an award will not be set aside because letters are put in as evidence by one of the parties, which are not legal evidence, if the circumstances and the conduct of the arbitrators are consistent with the supposition that they only read the letters for the purpose of judging of their admissibility as evidence, and it not appearing that they actually received them as evidence.

A taxation by a deputy clerk of the crown of costs under an award, on a reference to arbitration of two causes in different courts, together with all matters in difference, is not a nullity, as being beyond his jurisdiction, and probably not even an irregularity.

[Prac. Ct., E. T., and June 24, 1871.—GWTYNE, J.]

On the 1st day of April, 1870, there being two cross-actions pending between the above parties, they, by an agreement of that date, signed by them, agreed to refer the said actions, and all matters in difference between them, to the award, order, final end, and determination of Thompson Smith and Stephen T. Peckham; and in case the said arbitrators should not agree in the determining any matter or thing or matters or things thereby referred to them, the matter or thing in which they should not agree should from time to time be referred to and determined by such person as they should appoint in writing, before entering upon the consideration of the matters referred; so as the award or umpirage

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should be made, ready to be delivered, on or before the first day of May, then next, or on or before any other day not later than the first day of July, then next, to which time the said arbitrators were empowered to enlarge the time for making the said award and umpirage.

Nothing having been done under this submission, the above parties, Hotchkiss and Hall, by an agreement signed by them, endorsed on the agreement of reference, and dated the 18th February, 1871, enlarged and extended the time for making an award under the terms of the agreement until the first day of May, 1871. Thereupon, and before entering upon the consideration of the matters referred, the arbitrators, by an appointment endorsed on the agreement of reference and signed by them, appointed Henry Stark Howland as umpire, under the terms of the reference.

The arbitration was thereupon proceeded with throughout in the presence of the arbitrators and the umpire.

The arbitrators, Smith and Peekham, made their award in the premises, signed by them, upon the 17th March, 1871; a copy of the award so made was served upon Hotchkiss, at the instance of Hall, upon the 28th day of March last.

By the submission it was agreed that the same should be made a rule of the Court of Queen's Bench, and early in Easter Term last it was made a rule of that court. On the 22nd May a rule *nisi* was obtained, at the instance of Hall, calling upon Hotchkiss to shew cause why the money directed to be paid by the award should not be paid in pursuance of it. Upon the 30th of May this rule was made absolute, no cause being shewn to the contrary, and all the conditions entitling the applicant to such an order having been fulfilled.

On Friday, the 2nd June, *McCarthy*, on behalf of Hotchkiss, moved for a rule *nisi* to set aside the award on various grounds.

C. Robinson, Q. C., being present in court, intimated his intention to shew cause in the first instance, and Mr. *McCarthy* proceeded with his motion, but at the rising of the court had not concluded. In the course of his argument he mentioned certain matters which, he said, appeared on affidavit. Being requested to read that affidavit, he found that he had it not with him in court, and upon leaving court at its rising, the learned Judge said that he would hear the affidavit in the morning.

On the following morning it appeared that after the rising of the court two affidavits had been filed, including the one which had not been in court during the argument. After citing a case, Mr. *McCarthy* desired that it should be considered that his motion had been closed on Friday, and insisted that under an old rule of the Court of King's Bench in England, 36 Geo. III., cause cannot be shewn on the last day of term, to an application to set aside an award. But, by leave of the learned Judge,

C. Robinson, Q. C. (*O'Brien* with him), now showed cause, subject to this objection.

D. McMichael and *McCarthy* supported the rule.

GWYNNE, J.—In the latest editions of Mr. *Archbold's* work, although this old rule cited by Mr. *McCarthy*, that cause cannot be shown on the last day of term, is referred to, it is stated that

in modern times the practice is sometimes departed from; and in this case, if it is competent for me, I esteem it my duty to relax the rule. When the court rose upon the Friday, the motion had certainly not been concluded—a material affidavit, which was relied upon, was not in court, and I consider it to have been well understood by all parties, as it was by the court, that the motion should be renewed in the morning. I must therefore consider that the motion is too late, as having been carried into and made upon the last day of term, or I must give to Mr. *Robinson* the benefit of being considered to have opened his case on the Friday, and continued it only on the Saturday. A rule which must be considered as having been established to promote convenience cannot, I think, be permitted to be appealed to for the purpose of effecting what would manifestly be an injustice. I consider therefore, that I am not only not prevented by rigid rule from considering the argument as heard, but that it is my duty in the particular circumstances to prevent the objection prevailing.

The grounds stated in the motion paper for setting aside the award are: 1st, That *Thompson Smith*, one of the arbitrators, to whom the said matters were referred was partial and corrupt in his conduct as such arbitrator, and acted throughout in an unfair and unjust manner towards the said *Lewis Hotchkiss*.

2nd. That the said *Thompson Smith* heard the statements and examined the papers of the said *William Hall* with reference to the matters submitted, behind the back of the said *Lewis Hotchkiss*, and at times when the said *Lewis Hotchkiss* had no notice or knowledge of such statements being made, and when no meeting for the prosecution of the said reference had been appointed.

3rd. That the said *Thompson Smith* and *Wm. Hall* had consulted together with reference to the matters pending before the said arbitrators, from time to time, during the time that the said reference and hearing were being had.

4th. That the said arbitrators improperly admitted and received as evidence letters alleged to have been written to one *Wood* by persons unknown to the said *Lewis Hotchkiss*, alleged to be in respect to the way the lumber said to be manufactured by the said *William Hall* for the said *Lewis Hotchkiss*, was manufactured, and as to whether the same was merchantable or not, which were the chief matters in dispute between the said parties, and in respect to which the said submission was made.

5th. That the said *Thompson Smith* acted improperly in refusing, during a portion of the time that the said reference was being heard and proceeded with, to permit or allow the said *Lewis Hotchkiss* to have notes made by a third person, although the said *Lewis Hotchkiss* was unable to take or make notes himself of the evidence of the witnesses examined on behalf of the said *William Hall*.

6th. The motion paper also asks that the rule made ordering payment of the amount of the said award and the costs taxed in pursuance thereof, and the execution issued thereupon, may be set aside or rescinded on the grounds aforesaid, and on the further ground, that the said costs purporting to be taxed in pursuance of the said award were taxed irregularly and improperly by

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the deputy clerk of the Crown and Pleas for the County of Simcoe, who had no power to tax the same.

The first, second, third and fifth of the above grounds attack the conduct and motives of one only of the arbitrators, Mr. Smith. The affidavits upon which the application is based, impute to him partiality and corrupt conduct in this, that, as is charged, he acted throughout in an openly partial and unfair manner, and as the advocate of Hall, and not as an arbitrator, and to this conduct the applicant Hotchkiss imputes the result that an award unfavorable to him has been made, and which he considers as unjust.

The first ground, taken by itself, is altogether too vague to be entertained as an accusation against a person filling a judicial office: *Barr v. Gamble*, 4 Grant 626. In *Bedington v. Southall*, 4 Price, 281, cited by McLean J., in *Slack v. McEathron*, 8 U. C. Q. B. 184, it is laid down that "the court requires *strong facts* and to be *distinctly* stated, in cases of setting aside awards and that a denial of any such is *conclusive*." Charges of corruption should not be imputed upon slight grounds. The facts which are relied upon as establishing the charges should be clearly, unequivocally and positively averred. Judges of the parties' own choice must not be permitted to be exposed to accusations of corruption based upon loose surmises, suspicions and conjectures of disappointed suitors, or upon insinuations of corrupt innuendoes attached to words innocent in themselves and naturally capable of an honest interpretation. In this case the charges of partiality and corruption made against Mr. Smith are, in my judgment, wholly displaced by the affidavits filed in answer.

Mr. Howland, the umpire, who was present during the whole of the arbitration, says that he has read a copy of the affidavit of Lewis Hotchkiss proposed to be used, as he is informed, in an application to set aside the award, and he says that the statements and insinuations of said Hotchkiss as to partiality and unfairness on the part of Thompson Smith, one of the arbitrators, at the said arbitration, are *unjust and unfounded*: that the whole conduct of said Smith during the said arbitration was only that of an arbitrator desiring to elicit the truth from the witnesses without reference to whom they were called by, and he acted throughout with great fairness to both parties and not as an advocate for either, and the arbitration was conducted in a fair, open and proper manner; and he says that the award was concurred in by the two arbitrators, and having been present as umpire during all the proceedings, he adds, that the award was a fair and equitable adjustment of the matters in difference between the parties. Four other persons who were examined as witnesses before the arbitrators, and one of them as a witness for Hotchkiss, swear that Mr. Smith shewed no partiality to or preference for the said William Hall, and that both he and his arbitrator, Stephen T. Peckham, acted throughout fairly and impartially, and fairly, honestly and justly endeavoured to elicit the truth with regard to the matters in dispute.

With reference to the second and third grounds of objection, I cannot find a single fact alleged in support of the grave charges comprehended under

these heads. Mr. Hotchkiss says that he *charges* and verily *believes* the accusations to be true, but offers not a particle of evidence upon which his charge and belief is founded, except that he alleges that the documents, books and papers used by Hall in evidence, were from time to time produced by the said Smith and handed to the said Hall for the purpose of being used in evidence in the said matter before said arbitrators.

Now the only foundation for the above grave charges is explained by the affidavits of Hall and of Mr. Howland, the umpire, in this manner—The arbitration was held at the Queen's Hotel, Toronto, and continued seven days; at the commencement of the arbitration, Hall produced a large bundle of books and documents which he required to refer to during the arbitration, and handed them in to the arbitrators. All those papers, and all papers and vouchers produced at the arbitration were kept in a desk belonging to Smith, looked up when the arbitrators rose from day to day, and the key was kept by the umpire or Smith, and the desk placed in the safe of the Queen's Hotel: constant reference was made to these papers in said desk during the arbitration, and the papers were handed to the parties by Smith from it when asked for or required. As to the charges themselves, Hall in his affidavit unequivocally denies them, and says that the only statements that he ever made of his case to Mr. Smith (except on the arbitration), were such as it was necessary to make for the purpose of explaining the points in dispute generally, in order to obtain Mr. Smith's consent, to act as arbitrator, which position he was averse to undertaking, owing to his other engagements.

The fifth ground of objection, although containing a charge pointed at Mr. Smith only, does indirectly assail the conduct, not only of the arbitrator, Mr. Peckham, who it is stated was a partner in business of Mr. Hotchkiss, although not interested in the matters which have given rise to this arbitration, but also of Mr. Howland, the umpire, for these gentlemen could not possibly have sat by and permitted Mr. Smith to control the matters referred to in the manner which is imputed to him, without sharing in the guilt of whatever misconduct is properly attributable to him in respect of the matter complained of. The explanation, however, which is given of the transaction, satisfactorily shews that it is not susceptible of the colouring and complexion given to it by the applicant Hotchkiss, and that what in fact was done, so far from amounting to corruption or misconduct, cannot be characterised even as an irregularity or an error of judgment.

I have noticed that Mr. Peckham, one of the arbitrators, although not interested in the subject matter in dispute, is said to have been a partner in business of Mr. Hotchkiss. Mr. Smith, the other arbitrator, is sworn to have been selected as an arbitrator as being known throughout the Province as one of the most, if not the most extensive, experienced, honourable and fair men in the timber business in the whole Province. Now so anxious do the parties, Hotchkiss and Hall, appear to have been to submit the matters in difference to the absolute uncontrolled judgment of these gentlemen, or in case they should differ, of an umpire chosen by them, that in the agreement of reference they contract with

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each other as part of the terms upon which the submission to arbitration is made: "That the said parties are not at liberty to appear or be represented before the said umpire or arbitrators or umpire by counsel, attorney, solicitor, or agent, but are to conduct the hearing of the said matters referred, in person, but the said arbitrators or umpire may employ legal assistance in framing or drawing up their or his award when settled upon."

At the opening of the arbitration, Mr. Hotchkiss brought with him his bookkeeper, a Mr. Hilborn, and he desired to be assisted by him in taking down the evidence. Hall, and not Mr. Smith the arbitrator, objected to this arrangement as contrary to the above terms of the agreement, and he claimed, if the privilege should be granted to Mr. Hotchkiss, that it should be granted to him also. Hall's objection was upheld. However, during the course of Hall's examination, which I understand to have been on the first day of the arbitration, it appearing that Mr. Hotchkiss, from some injury in his hand, could not take down his notes sufficiently well, the arbitrators, with Hall's consent, allowed him to avail himself of Hilborn's services, which he from thence did until the close of the arbitration, which lasted for seven days, although no similar privilege was granted to Hall. It is preposterous that a motion to set aside an award should be based on a transaction of this nature, and it is singular, that the person to complain is the one in whose favor his own agreement for submission to arbitration was released with the consent of his opponent.

With respect to the fourth objection, what I find, upon comparison of the affidavits, to be the facts in relation to the matter which is made the subject of this objection, is as follows: Hall shipped the lumber which was the subject of dispute, after Hotchkiss refused to receive it, to one Peter Wood, at Chicago; the latter sold it to divers persons, and Hall being desirous of proving the quality of the lumber by Wood, and by the persons to whom he sold it, wrote to Wood to come over himself, and to bring some of the other parties with him. These parties it would seem, being unwilling to come over, wrote letters to Wood approving of the lumber; these letters Wood transmitted to Hall, and he, before Wood arrived, appears to have desired to use the letters as evidence before the arbitrators. This was objected to by Hotchkiss, and his objection prevailed, and the letters were not received in evidence or read; they had however, been marked when first produced, and were laid aside unread. At a subsequent stage of the arbitration Wood was called as a witness to give his evidence, and during the course of his examination he referred to the letters, read them, and said he had received them from the parties to whom he sold the lumber. I do not find that Hotchkiss during Wood's examination objected to the letters being read by him, or to his making statements as to how he received them; on the contrary, I arrive at the conclusion that it is established that Hotchkiss cross-examined Wood upon these points, and that he had full opportunity then of seeing the letters, and that he heard them read, and from Hotchkiss' affidavit, and that of Hilborn, I gather that he elicited from Wood the fact that the

letters were written by the parties in reference to this arbitration.

I have referred above to the apparent anxiety of the parties to submit their differences to the absolute judgment of the arbitrators, unaffected by the legal suggestions of counsel, attorneys, or solicitors, with the view, as it would seem, of having their disputes settled by business men without the aid of lawyers; but whether or not the clause was inserted with the view of excluding legal objections to the decisions of the arbitrators, it cannot be disputed at the present day that the decision of an arbitrator, whether lawyer or layman, is binding on the parties both in matters of law and in matters of fact, unless there has been fraud or corruption on his part, or there be some mistake of law apparent on the face of the award, or of some paper accompanying and forming part of the award. *Hodgkinson v. Fernie*, 3 C B N. S. 189; *Hodge v. Burgess*, 3 H. & N. 298; *Severn v. Cosgrave*, 2 U C L. J. N. S. 18; *Haigh v. Haigh*, 8 Jur. N. S. 983; *Hugger v. Baker*, 14 M. & W. 9, and many other cases put this point beyond a doubt. In *Hodgkinson v. Fernie*, Williams, J., says: "Many cases have fully established that position where awards have been attempted to be set aside on the ground of the admission of an incompetent witness, or the rejection of a competent one."

In *Haigh v. Haigh*, 8 Jar. N. S., at page 934, that learned judge, Sir G. J. Turner, says: "An arbitrator being a judge selected by the parties, and chosen to decide without appeal, this court has nothing to do with any mere error in judgment on his part. The parties have chosen him to be their judge, and have agreed to abide by his determination, and by that determination, if fairly and properly made, they must be content to be bound; but on the other hand, arbitrators, like other judges, are bound, where they are not expressly absolved from doing so, to observe in their proceedings the ordinary rules which are laid down for the administration of justice, and this court when called upon to review their proceedings is bound to see that those rules have been observed. The difficulty which the court has to encounter in determining a question of this nature, is not as to the principles by which its decisions ought to be governed, but as to whether what has been done falls within the range of the arbitrators' judgment or contravenes the rules which ought to be observed in collecting the materials on which that judgment is to be exercised."

Now whether a witness be competent or incompetent is a question of law, which, however, falls within the range of an arbitrator's judgment, and his honest judgment on the point, though contrary to law, cannot be questioned. So likewise, whether these letters, referred to as they were by the witness Wood, became by the aid of his testimony admissible evidence, was a question of law, but one which fell within the range of the arbitrators' judgment, and their decision, though not in accordance with law, cannot be questioned; and, with a view to judge of their admissibility, it was necessary for the arbitrators to see their contents; but the case is wholly defective in shewing that the letters were received as evidence, or that the arbitrators in any respect formed their award upon their contents.

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In *Hagger v. Baker*, 14 M. & W. 9, the admission of similar evidence was held to be no ground for setting aside an award. It may be that Wood referred to the letters simply to prove the truth of what he may have sworn to, namely, that the parties to whom the lumber was sold were satisfied with it, and had so told him, and a proof of this allegation was afforded by the letters.

The case upon this head has been likened to *Hickman v. Lawson*, 8 Grant, 386, and *McEdward v. Gordon*, 12 Grant, 383; but *Hickman v. Lawson* proceeded upon the principle that the rules of natural justice had been violated in the arbitrators examining a witness for one of the parties in the absence of, and without notice to the other; and *McEdward v. Gordon* proceeded on the same principle. Mr. V. C. Spragge likened it to the case of *Walker v. Frobisher*, 6 Ves. 70, wherein the arbitrator acted in violation of natural justice in receiving evidence from one of the parties in the absence of the other, after he had given notice to both that he would receive no more, in which both acquiesced. In *McEdward v. Gordon*, an affidavit of a witness upon one side, upon the most material point, was received against the urgent opposition of the other party to the award. Now that also was a plain violation of a rule of natural justice, that a party should not be examined as a witness without giving to the opposite side in opportunity of cross-examination, and here it has been urged that there is an agreement in the submission that "the witnesses on the reference, and the parties if examined, shall be examined on oath," and it is contended that the reception of the letters is in excess of the jurisdiction conferred by this clause; but this firstly assumes the letters to have been received as evidence of what may have been contained in them, which does not appear; and moreover, the clause in my judgment does not affect such a case as this, it is intended to provide for the examination of the witnesses being taken not only *viva voce* so as to permit of a cross-examination, but that such *viva voce* examination shall be taken only after the administration of an oath: and even in the case of the examination of a witness without oath, although there be such a clause as that above in the submission, all right to object may be expressly or impliedly waived by the acts and conduct of the parties: *Biggs v. Hansell*, 16 C. B. 572; *Allen v. Francis*, 9 Jur. 691. This latter case seems to be a strong authority that the objection, if one of which in this case Hotchkiss could avail himself, was waived by him on his examining Wood, as I find that he did, upon the subject of the letters, and by his permitting them to be read, as I find he did, by Wood in his examination, without any objection then made to their being read. When the letters were read and referred to by Wood in his examination, and the purpose for which they were written was elicited from him, it became a matter, if the point was then raised by Hotchkiss, upon which the arbitrators had to exercise their judgment, whether the letters should be received or not for the purpose, whatever it may have been, for which they were referred to. Hotchkiss contended that they should have properly exercised that judgment by rejecting the letters, but there was no impropriety in looking at the letters, and, that it was

a matter calling for the exercise of their judgment, is admitted. Now there is no evidence to lead to the conclusion that the arbitrators did not exercise that judgment by not receiving the letters as evidence, but the point being, as I think it was, "within the range of their judgment," as expressed by Sir George Turner, and not a matter as to which their jurisdiction was fettered by the term in the reference as to the examination of witnesses upon oath, the award cannot be set aside for anything contained in the fourth objection.

It was urged by Mr. McCarthy, that Mr. Smith should be required himself to answer a passage in Hotchkiss' affidavit, the whole effect of which is to insinuate that under the pronoun *we*, said to have been repeatedly used by him during the arbitration, he meant himself and Hall, so as to impute to him corrupt and partial conduct;—but as I have already said, all pretext for imputing corruption and partiality is, in my judgment wholly removed by the affidavits filed in answer; and I am of opinion that under the circumstances he may be excused for not having thought it necessary to explain that words which if used were naturally capable of a perfectly innocent interpretation and application, as having reference to himself and his co-arbitrators, were not meant to apply to himself and Hall, as insinuated by the unsuccessful party in the litigation.

Mr. McCarthy also asked leave to file affidavits in reply to the affidavits filed in answer to his application, but the points upon which he wished to reply are not, in my judgment, such as to entitle him to that privilege, and the rule for setting aside the award must be refused.

As to so much of the motion as asks that the rule made ordering payment of the amount of the award with the costs taxed in pursuance thereof, it is plain that this cannot be granted upon the grounds urged for setting aside the award, and which I consider to be insufficient for that purpose. Mr. McCarthy's argument was, that these objections could not have been shewn as cause against the granting of the rule, they cannot therefore be entertained upon a motion to set aside the rule ordering payment. Then as to the objection stated in the motion paper, that the costs purporting to be taxed in pursuance of the award, were taxed irregularly by the deputy clerk of the Crown and Pleas for the County of Simcoe,—it is apparent that the applicant and his attorney have not placed much stress upon this as an objection, for nowhere in the affidavits filed on the motion is it stated where the costs were taxed; it was, it is true, stated in the argument, that they were taxed in the County of Simcoe, after notice given according to the ordinary practice, but there is no foundation whatever made in the affidavit for the objection, and in such case I do not think I can notice what was said in argument. However, I am not prepared to say that it was incompetent for the deputy clerk of the Crown and Pleas in the County of Simcoe to tax the costs. No case was cited to me to shew that he had not jurisdiction, and in view of the effectual appeal given in respect of, and the control exercised over taxation by deputies by the 331st section of the Common Law Procedure Act, I do not at present see why the deputy clerk may not exercise his jurisdiction

C. L. Cham.]

REGINA v. McNANEY.

[C. L. Cham.]

in the absence of any special provision of law, or decided case limiting his jurisdiction. But further, unless the applicant is prepared to establish that the taxation is a nullity, which I at present fail to see, this is an objection which could have been, and therefore should have been shewn as cause against the making the rule absolute; for all these considerations I must refuse to set aside the rule, judgment and execution, upon this ground,—leaving the complainant, if the costs taxed are excessive, to obtain a revision under the 331st section of the Common Law Procedure Act.

Where a party shews cause in the first instance, the general rule is not to give him costs if successful, but it seems this is not an inflexible rule, it is in the discretion of the court wholly to grant or refuse the cost; and the court will exercise that discretion by giving costs when the rule if unopposed would have operated as a stay of proceedings: *Blackburn v. Edwards*, 10 Ad. & Ed. 21; *Norris v. Carrington*, 16 C. B. N. S. 396.

In this case the applicant having made charges as I think without any foundation, I might perhaps properly subject him to payment of costs, but I shall adhere to what is considered to be the general rule. The rule therefore will simply be refused.

Rule refused.

COMMON LAW CHAMBERS.

REGINA v. McNANEY.

Con. Stat. U. C. cap. 76—29-30 Vic. cap. 45—Apprentice—Execution of contract—Amendment of return to certiorari.

Upon an application under 29-30 Vic. cap. 45, for the discharge of a prisoner, committed under the Apprentices' and Minors' Act for disobedience to his masters, on the ground, *inter alia*, that the indenture of apprenticeship was not a binding contract, it having been executed by one only of the employers, in the name of the firm.

Held, that the indenture must be considered to be sufficiently executed, as it was binding at all events upon the apprentice and the partner who had signed it, and there was nothing to show that his co-partners had not been present and assented to the execution.

Held, also, that where a *certiorari* simply requires a return of the evidence, the magistrate need not return the conviction or a copy of it.

Semble: If material evidence is unintentionally omitted from such a return, an amendment may be allowed for the purpose of obtaining such omitted evidence, but only with the concurrence of the parties and of the witness by whom the deposition was signed in the correctness of the additions.

[Chambers.—July 27, 1871. *Wilson, J.*]

O'Donohoe obtained a writ of *habeas corpus* to bring up the body of one Owen McNaney, who had been committed to the common gaol of the county of York under the provisions of the Apprentices' and Minors' Act, Con. Stat. U. C. cap. 76, sec. 10, for disobedience to the orders of Messrs. Beard Bros, his masters; and also a writ of *certiorari*, directed to Alexander MacNabb, police magistrate for the city of Toronto, to send up the evidence had before him, and upon which the warrant of commitment had been founded.

Both writs having been returned, on the 26th July last, *O'Donohoe* moved for the discharge of the prisoner, under 29-30 Vic. cap. 45, on the grounds:

1. That there was no legal contract of service, as the indenture of apprenticeship was not

signed by the prosecutors, and was therefore bad for want of mutuality: *Lees v. Whitcomb*, 5 Bing. 84.

2. That the contract, being signed by the employers under the name of "Beard Brothers," could not be properly executed by one partner alone without the production of a written authority under seal from the remaining partners: *Addison on Contracts* (Ed. 1869), 1052; *Gould et al v. Barnes*, 8 Taunt. 505.

3. That even if the contract had once been binding, it was terminated by the change in or dissolution of the partnership which had taken place since its execution: *Brook v. Dawson*, 20 L. T. N. S. 611.

4. How and in what particulars the apprentice disobeyed the orders of his employers, must be stated: *Paley on Convictions*, 210; *Colborne v. Stockdale*, Str. 493.

5. That the commitment was bad, as no conviction appeared to have been made: *Reg. v. Rhodes*, 4 T. R. 220; 32-33 Vic. cap. 31, sec. 42.

M. C. Cameron, Q. C., for the Crown, opposed the discharge of the prisoner, on the grounds:

1. That the *certiorari* did not require a return of the conviction, and therefore the fifth objection must fail.

2. That there was no return of any evidence showing a dissolution or change of partnership, if any had taken place.

3. That there was a valid execution of the indenture of apprenticeship by the member of the firm who had actually signed it, and therefore a binding contract existed between the parties.

He referred to *Ball v. Dunsterville*, 4 T. R. 313; and *Bowker v. Burdakin*, 11 M. & W. 128.

ADAM WILSON, J.—As to the evidence which it is said was given of the change in or dissolution of the firm of employers after the making of the articles of apprenticeship in question, I cannot of course act upon it, as if it had in truth been given before the police magistrate, because no such evidence has been returned by him, and there is no affidavit before myself stating that such evidence was given. It may probably have been given in fact before the police magistrate, and he may have omitted to note it, either unintentionally or because he may have thought it at the time to have no particular bearing on the case. If the evidence were given, but not noted, I think the magistrate might be allowed to amend his return by setting it out as a part of the written evidence, if he remembered what it was, and if both parties concurred in the correctness of the addition. I am not quite clear that the magistrate can amend the notes from his own recollection after the evidence has been returned, but I am disposed to think he might be allowed to do so. It could be done only with the concurrence of the witness, if he had signed the deposition.

If the magistrate did not truly return the proceedings, he would be liable for making a false return. If he omitted to return some matter which he should have returned, I have no doubt he might be allowed to amend his return. Here he has returned truly all he intended and all he had it in his power to return; and now it is suggested he might amend the evidence which

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he took by adding to it a fact which was deposed to, but which he did not note at the time. I think, as I have said, that may be done. I do not think the omitted evidence can be supplied by affidavit, though an affidavit is allowable in some cases, to show what has actually occurred before the magistrate: *Re Thompson*, 6 H. & N. 198; *The Queen v. Bolton*, 1 Q. B. 66; *Ex parte Baker*, 8 Jur. N. S. 937.

I think the want of the conviction cannot be complained of, as the terms of the *certiorari* do not call for it. If the magistrate should have returned it, and had not done so, I should still allow him an opportunity of doing so; for no doubt there is such a proceeding. If he had already returned it to the clerk of the peace, he might show that fact, or he might transmit a copy of it instead, stating why he could not return the original: *The King v. Eaton*, 2 Q. B. 285.

This reduces the objections to the one relating to the mode of execution of the instrument of apprenticeship. The execution, though in that informal manner, is sufficient if all the partners were present at the time and assented to its being so executed: *Ball v. Dunsterville*, 4 T. R. 818.

In *Bowker v. Burdekin*, 11 M. & W. 128, it was held that the partner who executed an assignment of his goods and effects, though it was intended that his co-partners should also have joined in it, and they were named in it, had passed his own estate, although his partners had not signed it.

It has been argued here that this instrument is binding in that view upon the partner who actually signed it, even if it be not binding on his co-partners, and so there is a valid contract with that partner. That partner, I presume, is bound; but whether the contract produced is therefore valid, is another question.

The case referred to shows the individual share of the partner would pass, so long as he delivered the deed as complete on his part, and not as an escrow. In this case the apprentice bargains for the partnership responsibility to him, and he has not got it unless all the partners were present and assented to the execution by their co-partner. The infant cannot therefore sue them, though he may sue the partner who executed the deed.

In some cases the question has been, whether a person who has not executed the deed can sue the one who has executed it. The rule seems to be that in leases, the lessor who has not executed, and who has not therefore conferred the estate on the other party contemplated and bargained for by him, cannot sue him for not repairing, or for non-payment of rent, or for any such cause, which assumes and is based upon an estate having been granted; but with respect to other covenants in the lease, not depending on the interest in the land, the covenantee may sue the covenantor though the covenantee has not executed the deed, and although the covenant sued on is stated to have been entered into in consideration of the covenants which the other should have executed: *Pitman v. Woodbury*, 8 Exch. 4; *Morgan v. Pike*, 14 C. B. 478. See also *Millership v. Brookes*, 5 H. & N. 797, where the same point as to an apprentice was argued, but no judgment given on it.

I am not prepared to say that this indenture, though it had not been executed by the employers at all, would not have been binding on the apprentice, although he could not have sued upon it. He might, however, have compelled the master to execute it on a proper case for relief made out: *Brown v. Banks*, 7 Jur. N. S. 1273. I cannot, therefore, give less effect to this indenture, which has been executed by one partner, and must therefore bind him, than if it had not been signed by any of the members. An agreement of this kind, if not beneficial to the infant, will not be binding on him: *Reg. v. Lord*, 12 Q. B. 767. But this agreement is just as beneficial to him as it would be to a person of full age.

It appears that notwithstanding this conviction, the party may be prosecuted a second time under the same agreement, if any further cause of complaint arise; but if the fact be, as has been stated, that the partnership in force at the time has been since dissolved, it may be of very little consequence to the prosecutors that the evidence on that point does not now appear on this return; for it will be sure to be brought out and noted on any future occasion, if that should unhappily arise.* The case of *Brooke v. Dawson*, 20 L. T. N. S. 611, referred to by Mr. O'Donohoe on this point, I have not referred to, for the reason already given.

On the only exception which I have been at liberty to consider, I think the application fails; and that the prisoner must be remanded for the residue of his time of imprisonment.

NOVA SCOTIA.

IN THE SUPREME COURT.

IN RE E. D. TUCKER, AN INSOLVENT.

Insolvency Act of 1869, ss. 36, 55, 83, 97 & 101—Discharge—Confirmation—Dividends.

It is optional with an insolvent whether he will proceed under sec. 97, or under sec. 101 of the Act of 1869; and when there is reason to anticipate that the discharge will be opposed, the latter course is more expeditious. Where a deed of composition and discharge has been duly executed and filed with the assignee, if *seems* notice of the filing and of the insolvent's intention to apply for a confirmation of his discharge may be given at once under sec. 101, although the month allowed by sec. 36 (Form I.) for creditors to file their claims has not expired. The assignee may declare a dividend at any time within one month after his appointment, and thereafter at intervals of not more than three months.

[Sup. Ct. N.S., June 2, 1871.—*Sir W. Young, C. J.*]

Sir WILLIAM YOUNG, C. J., now (June 2, 1871,) delivered judgment as follows:

This is an appeal to me under the Dominion Insolvent Act of 1869, section 83, from an order of the Judge of Probate and Insolvency at Halifax, made on the 18th March last. It was a final order or judgment refusing a discharge to the insolvent under a deed of composition, on preliminary or technical objections arising out of the Act, and without any examination of the insolvent or enquiry into the validity of the deed. I had supposed when I granted a rule nisi on

* The point has since come before the Common Pleas in *The Queen v. Redden et al* (M. T. 1871), where the court held that such dissolution having taken place, apprentices under indentures to the original firm could not now be indicted for conspiracy at the instance of the present partners.—Eds. L.-J.

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the appeal, that these were the only objections, but it appeared on the hearing before me on the 28th ultimo, that other objections alleged to be of a more serious kind were behind, with which at present I have nothing to do. An objection also was taken to the regularity of the appeal under section 84, which I think is untenable.

The insolvent made a voluntary assignment, dated the 28th February, 1869, and delivered 1st March to the interim assignee, who forthwith called a meeting of the creditors, under sec. 2, for the 15th. The creditors who had proved their claims under section 122, thereupon appointed the interim assignee to be the assignee of the estate. On the 24th March a deed of composition and discharge was prepared by the insolvent, which was filed with the assignee on the 29th, and the insolvent thereupon published an advertisement of that day, and continued it for one month, that on the 1st of May he would apply to the Insolvency Court for a confirmation of his discharge. The order of the 18th May—the subject of this appeal—was the result of that application.

The first objection was, that the insolvent had not deposited the deed with the assignee for the purposes contemplated, nor had the assignee pursued the course prescribed by section 97. This section is analogous to the 2nd sub-section of section 9 of the parent Act of 1864, and the question is whether it is imperative or optional. If acted on, and no opposition to the composition and discharge is made by a creditor, it saves time and is a great advantage to the insolvent. But where he has reason to apprehend (as was the case here) that opposition would be made, there was neither saving of time nor advantage to either party, and upon the best consideration I can give to this clause, I am of opinion that the insolvent may waive it in all cases if he thinks fit, and proceed under section 101.

The second objection was that one month's notice had not expired from the first meeting of creditors of the insolvent before the deed of composition and discharge had been filed in court, and acted upon as required by section 86 of said Act. By section 86 the assignee, immediately upon his appointment, shall give notice thereof by advertisement in form I, which requires creditors to file their claims before the assignee within one month—that is, in this case, by the 15th or 16th of April. Creditors having by the statute this time to come in, was it legal to file a deed of composition and discharge, and publish an advertisement on it (which is the action referred to in the objection) on the 27th March? There is more in this objection than in the former; and yet, if the deed in point of fact when filed has been executed by a majority of the creditors under section 94 (which is the main inquiry), there is no reason for the delay, as the confirmation itself cannot take place before the month has expired. There seems to have been no decision on this point in Canada, and the commentators there differ upon it, as will be seen upon reference to Mr. Abbott's edition of the Act of 1864, folio 67, and the doubt in Mr. Popham's edition of the Act of 1869, folio 124. The hearing before the judge in this case was on the 18th May, more than two months after the advertisement to the creditors, when the objec-

tion in point of time was reduced to a mere technicality, which, as I think, ought not to prevail.

The third objection proceeded, as I conceive, on a misapprehension of the Act. It was assumed that no dividend could have been declared on the 1st of May, nor until three months had expired after notice of the appointment of an assignee. That is not the meaning of section 55. The assignee may declare a dividend, if he have funds, at the end of one month, or as soon as may be after the expiration of such period, and thereafter at intervals of not more than three months. I overrule, therefore, this objection, and regret that the hearing below was confined to these niceties of construction, in place of the main issues. The counsel for the insolvent insisted that these were now excluded, and the opposing creditors having failed on these preliminary points, that the insolvent was entitled to a discharge without further inquiry. But I cannot assent to this view, which would be against the analogy and the practice of all courts, and I content myself with disposing of the points before me, and setting aside the judgment of the 18th May, and the order of the 22nd May thereon, with costs.

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CHANCERY.

COLLINS V. COLLINS.

Will—Word "Moneys"—What it includes.

A testator by his will bequeathed "all the moneys, both in the house and out of it." He was possessed of a sum of consols and some shares in a building society; *Held*, that neither passed by the bequest.

[24 L. T. N. S. 780—V. C. B.]

Robert Collins made his will, dated 18th March 1862, as follows;

"As for my worldly goods and chattels, I bequeath them as followeth: first, to my son Thomas 700*l.*, to my son James 100*l.*, to my son Alfred 100*l.*, to my son Frederick 100*l.*, to my son Arthur 700*l.*, to my daughter Susanna 3000*l.*, and if married not to be sold out of the funds without her consent. And I also bequeath to her all things in the house remaining of whatsoever kind, and all the moneys, both in the house and out of it, for her own use. To my granddaughter Helen I bequeath 100*l.*, for her attention to me upon all occasions. And I appoint my son Thomas my sole executor to this my last will and testament."

A bill to administer the estate of the testator was filed by two of the next of kin against Susanna Collins and the other next of kin. The only question was whether a sum of consols and certain shares in a building society passed under the bequest to Susanna of "all the moneys both in the house and out of it."

Eddis, Q. C. and *Edwards* for the plaintiff.—We submit that the consols and building shares did not pass. There is a series of gifts, but no residuary gift. The word "money" will not pass stock in the funds. In the case of *Godsden v. Dotterill*, 1 My. & K. 56, the words were, "rest of my money," and it was there held that there being no explanatory context, the money would not pass stock. In *Lowe v. Thomas* 5 De G. M.

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& G. 815, the words were, "whole of my money," and it was held that there was nothing to show that the word "money" was used in any other than its strict sense. In *Ogle v. Knipe*, L. Rep. 8 Eq. 434; 20 L. T. Rep. N. S. 867, the question was whether under the words "money, and securities for money of every description," Bank Stock and canal shares would pass, and it was held they would not. The cases show that unless there is some explanatory context the word "money" will not pass stock or shares. The gift to Susanna is specific, not residuary, there is no word suggestive of residue. They referred also to 1 Jarm. on Wills, 2nd Edit., p. 644.

Cracknell for another of the next of kin. The words, "all my goods and chattels," in the beginning of the will will not carry a residuum, unless that is given by the body of the will. If Susanna takes the stock she must take it as specific legatee. He referred to *Collyer v. Squire*, 3 Russ. 467.

Willcock, Q. C., Cottrell, and Fellowes for others of the next of kin.

Fisher for Susanna Collins.—I claim the whole residue. Unless these words dispose of the residue, the testator has, contrary to his clear intention, died intestate as to the residue. The case of *Godsden v. Dotterill* does not apply here, and has been considered of doubtful authority: *Dowson v. Gascoigne*, 2 Keen 14; *Glendinning v. Glendinning*, 9 Beav. 324; *Waite v. Combes*, 5 De G. & S. 676. In *Love v. Thomas* there was no expressed intention of disposing of the whole personal estate. There is such an intention expressed here. That case is in my favour. In *Montague v. Lord Sandwich*, 33 Beav. 824; 9 L. T. Rep. N. S. 632, the Master of the Rolls says that the word "money" does not extend beyond actual money, unless those claiming the extended signification can show it. This we do. He also referred to *Grosvenor v. Durstan*, 25 Beav. 97; *Pritchard v. Pritchard*, L. R. 11 Eq. 232; 24 L. T. Rep. N. S. 259.

Eddis, Q. C. in reply.—*Wait v. Combes* and that class of cases are cases where the persons claiming under the will are persons for whom the testator is bound to provide. Here it is one child claiming against the others. The case of *Glendinning v. Glendinning* turned on the use of the word "property." *Dowson v. Gascoigne* does not lay down the rule that the word "money" by itself will pass stock.

Vice-Chancellor BACON.—The case of *Wait v. Combes* is distinguishable from the present case. The gift to Susanna of all the things in the house, and all the moneys both in the house and out of it, is specific. There is not any mention of residue. There is an intestacy as to the residue of the stock after the payment of the legacies, and as to the building shares, they will go to the next of kin.

COURT OF PROBATE.

(Reported by W. LEYCESTER, Esq., Barrister-at-Law.)

PEAT V. PEAT.

Administration—Personal estate insolvent—Grant to widow in preference to next of kin, who was also heir at law.

The heir at law and next of kin of an intestate objected to the grant of administration being made to the widow,

and on the ground that the personal estate was insolvent. The evidence of insolvency was not very conclusive either way, and the court declined to depart from the usual custom, and made the grant to the widow.

(25 L. T. N. S., 108, May 9, 1871.)

The intestate died possessed of both personal and real estate, and it was alleged on the part of the defendant that the debts and liabilities of the deceased exceeded the value of the personal estate, and that they could not be discharged without a sale of some portion of the real estate. The defendant's solicitor filed an affidavit in which he stated, "I believe and my London agents inform me this will be the proper course, the real estate, or a portion of it, will have to be sold to discharge the debts."

Inderwick, for the plaintiff, moved that administration be granted to the widow.

Dr. Swabey (*Bayford* with him), for the defendant, the heir-at-law and next of kin, contended that in granting administration, the court should regard the interest. The personal estate is insolvent, and the person most interested in its economical administration, is the heir at law, who is also next of kin. The court has the discretion to make a grant either to the widow or to the next of kin. It is true that the usual practice of the court has been to exercise its discretion in favour of the widow, but where the widow has no interest she must be passed over. They referred to *Williams on Executors*, vol. 1, pp. 402, 420, 6th edit., and the cases cited there.

Inderwick in reply.—Those cases only apply to where the widow has given up all interest, or has misconducted herself.

LORD PENZANCE.—There ought to be a very strong case to justify the exclusion of a widow from the administration. The cases which have been cited apply only to the proposition that where a widow has by a deed of settlement, or any other legal method, virtually stripped herself of all interest in the personal property of the husband, the court, by reason of her want of interest, may pass her by to make a grant to the next of kin. The present case depends simply on a question of figures. It is stated on the one side that the estate is insolvent, but notwithstanding that, no very affirmative statement to the contrary has been made on the other side. It may still be otherwise, and it seems to me that it would be difficult to determine positively whether the estate is insolvent or not. The question therefore in the present case is whether the court, by acting on a presumption that the personal estate will turn out to be insolvent, and consequently that the real estate will be charged partly with the payment of the debts should place the plaintiff in the position of a widow who has voluntarily and legally resigned all share she might have in her husband's personal estate. It seems to me that this would be going too far. I cannot be certain that there will be no surplus for her benefit. The defendant's attorney says there will be none, and his statement is partly confirmed by the letter of the plaintiff's attorney, in which, while writing on another subject he asserts that the real estate or a portion of it will have to be sold to pay the deceased's debts. But I do not see my way to an affirmative conclusion that the estate will be absolutely insolvent. There may be a surplus, and if so the widow will be entitled to

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one half Under these circumstances, she is entitled to administration. The order may be made peremptory, so that if she does not take the grant within fourteen days, the nephew may claim it for himself.

UNITED STATES REPORTS.

SUPREME JUDICIAL COURT OF MAINE.

ALEXANDER DUNN V. GRAND TRUNK RAILWAY COMPANY OF CANADA.

If a person enters the saloon-car of a freight railway train, and, when the train starts, without being requested or directed to leave, remains there as a passenger, contrary to the rules of the company, but with the knowledge of the conductor, who receives from him the usual fare of a first-class passenger, the corporation incurs the same liability for his safety as if he were in their regular passenger train.

On exceptions to the rulings of the Superior Court for the County of Cumberland.

Case for an injury alleged to have been received in July, 1868, while being transported from South Paris to Danville Junction, through the alleged insufficiency of the track and cars of the defendants, and the careless and negligent manner of managing them.

There was evidence tending to show that the plaintiff entered the saloon-car attached to the defendants' freight train, at South Paris station, for the purpose of going to Danville Junction; that the conductor saw him when the train started, and they conversed together; that he paid the conductor the usual fare of eighty-five cents; that the saloon-car was thrown from the track and dumped; that the plaintiff was thereby injured; that the car was thrown off by a broken rail, and that the fare was thereupon paid back.

There was evidence on the part of the defence, tending to show that the conductor notified the plaintiff when the train started that he had no right to carry passengers on the freight train, which was denied by the plaintiff.

It also appeared that the defendants issued a notice on May 23rd, 1866, that after that date "passengers would not be allowed to travel by freight trains on that part of the line between Portland and South Paris." On September 8th, 1868, they issued notice that "no passengers will be carried in the brake-vans attached to freight trains without written authority from the superintendent. * * * Any conductor allowing a passenger to travel in the brake-van, or on any part of the freight train, will be dismissed."

The defendants requested the presiding judge to instruct the jury:

1. That the plaintiff was not entitled by law to be carried in the freight train of defendant's company as a passenger, unless by permission obtained before he entered the train from some authorised agent of defendants; and that if the jury find that plaintiff entered the freight train at South Paris without such permission, then that plaintiff is not entitled to recover for the alleged injury, and their verdict should be for defendants.

2. That if the jury find that the defendant's company, before the time of the injury received

as alleged by the plaintiff, had established and published a regulation by which passengers were not allowed to travel by freight trains on that part of the line between Portland and South Paris, and that such regulation was in force at that time, then the plaintiff is not entitled to recover in this action, and their verdict should be for the defendants.

The judge did instruct the jury, *inter alia*, as follows: "I understand that the defence is substantially this, that inasmuch as notices had been issued and published by the directors of the company, prohibiting passengers from riding on freight trains, therefore this passenger being upon a freight train, the company was not liable for the injury that he received, though the company would have been liable if he had been in a passenger train. If there is any other defence, you have noticed it, and of course you will give them the benefit of it.

"I have been requested to give you a number of instructions touching this particular point, all of which I decline to give except this:

"I do instruct you, for the purposes of this case, that the plaintiff was not entitled by law to be carried on the freight train of defendant's company as a passenger, unless by permission obtained before he entered the train from some authorised agent of defendants. I give you that one, and no more. But I also instruct you, that if you find that the plaintiff was allowed by the conductor, upon his entering that car, and upon the starting of the train, to remain as a passenger on that train, in a saloon-car, that on a full knowledge of the facts, the conductor on that train allowed and authorised that man to remain there without directing him to get off, or any attempt to put him off, and that afterwards he received from him pay as a first-class passenger, not only to the next station where the freight train was to stop, but beyond that station to Danville Junction, a further point on the road where the plaintiff desired to go (for I understand the evidence is that he was going to Lewiston, and Danville Junction was the furthest possible point in that direction on this road), then I instruct you that the defendant's company cannot plead their regulation in release of their ordinary legal liabilities, but they are just as liable as if it had been a passenger train, and as if there had been no notices, provided that the plaintiff was not guilty of any fault or want of ordinary care himself."

The verdict was for the plaintiff, and the defendants alleged exceptions.

P. Barnes, for the defendants, cited *Iygo v. Neubold*, 9 Ex. 302; *Lucas v. New Bedford & Taunton Railroad Co.*, 6 Gray, 64, 70; 2 Redfield, 8rd Ed., 114; *Elkins v. Boston & Maine Railroad Co.*, 8 Foster, 275; *Robertson v. N. Y. & E. Railroad Co.*, 22 Barb. (N. Y.) 91; *Cleveland, Columbus & Cincinnati R. v. Bartram*, 11 Ohio, 457.

T. H. Haskell for the plaintiff.

APPLETON, C. J.—The defendants are common carriers of passengers and freight. They may carry freight in their passenger trains, or passengers on their freight trains. They have a right to make all reasonable rules and regulations in the management of their business, to which

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those in their employ, or those making use of their means of conveyance, are bound to conform when informed of their existence.

By one of the regulations of the defendant corporation, after May 28rd, 1866, passengers were not "allowed to travel by freight trains on that part of the line between Portland and South Paris." The regulation was a reasonable one, and the defendants were authorised to make it. It is, however, fairly inferable from the regulation itself that passengers had been previously permitted to travel by the freight train. By the notice of September 8th, 1868, dated at Montreal, no passengers were to be carried in the brake-vans attached to freight trains "without written authority from the superintendent," and "any conductor allowing a passenger to travel on the brake-van, or any part of the freight train, will be dismissed."

The plaintiff went aboard the freight train, in the saloon-car, and was there with the knowledge of the conductor. It was the duty of the conductor to inform him of this regulation, if it was to be enforced, and request him to leave. If no notice was given of this rule, and no request to leave, but instead thereof the usual fare was received, he had a right to suppose himself rightfully on board, and entitled to all the rights of a passenger. Every one riding in a railroad car is, *prima facie*, presumed to be there lawfully as a passenger, having paid or being liable, when called on, to pay his fare, and the onus is upon the carrier to prove affirmatively that he was a trespasser: *Penn. Railroad Co. v. Books*, 7 Am. Law Reg. N. S. 529. If not being rightfully on board, and being advised thereof, the plaintiff neglected or refused to leave, the conductor had a right to remove him, using no more force than was necessary to accomplish that object: *Fulton v. G. T. Railway*, 17 U. C. R. 428; *Hilliard v. Gould*, 34 N. H. 280; *State v. Gould*, 53 Maine, 279.

The regulations of the defendant corporation are binding on its servants. Passengers are not presumed to know them. Their knowledge must be affirmatively proved. If the servants of the corporation, who are bound to know its regulations, neglect or violate them, the principal should bear the loss or injury arising from such neglect or violation, rather than strangers. The corporation selects and appoints its servants, and it should be responsible for their conduct while in its employ. It alone has the right and the power of removal.

A passenger goes on board a freight train, enters the saloon-car, and remains there when the train starts, against the rules of the company, but with the knowledge of the conductor, and is not directed or requested to leave, but pays the usual fare of a first-class passenger to such conductor, and is injured on his passage by the negligence or carelessness of the railroad corporation: is he entitled to compensation for such injury? If inert matter be injured or destroyed by the negligence or carelessness of a common carrier, its owner can maintain an action, and recover damages as a recompense for such injury. Is the traveller entitled to the protection of the law, when the negligence of the carrier destroys his goods, and is he without its protection, when the same negligence injures his

health or breaks his limbs? If any extraordinary danger arises from the violation of the known rules of the company, as by standing on the cars when in motion, the passenger violating the rules assumes the special risks resulting from such violation. But if the act of the passenger in no way conduces to the injury received, the carrier must be held responsible for the necessary consequences of his negligence or want of care: *Baker v. Portland*, 10 Am. Law Reg. N. S. 559.*

In *Zemp v. W. & M. Railroad Co.*, 9 Rich. (S. C.) 84, there were two cars on the train, and the plaintiff's seat was in the forward car. Near the door on the rearward car was a notice that passengers should not stand on the platform. The train was running over an unfinished part of the road. The cross-ties were too far apart, and were insufficiently spiked, and the accident arose from "the breaking of the cleat at the end of one of the rails." All the other passengers were inside the cars, and none of them injured. The defence was that the injury arose from the plaintiff's own fault in standing upon the platform while the cars were in motion. The verdict was for the plaintiff, which the court refused to set aside, holding that whether the plaintiff had notice that the platform was a prohibited place, and if so, then whether under the circumstances his own act so contributed to the injury as to exonerate the railroad, who were guilty of negligence, were questions for the jury. The plaintiff's seat, "it will be recollected," observes O'Neale, J., "was in the forward car; the notice proved was in the rear car, on the platform of which he was standing when the accident occurred. That such notice is not enough to change the liability of the company to a passenger, is, I think, clear from *Story on Bailment*, s. 558. If the conductor had said to the plaintiff, as was his duty, 'you are in an improper place,' and he had then persisted in remaining, it might have been that this would have excused the company from any consequences which might have followed." An action was brought against a railroad company by a passenger, while travelling in one of its gravel trains. The defendant asked the court to instruct the jury that a railroad company was not liable for an injury which might happen to one taking passage in a gravel train, not engaged in carrying passengers. This requested instruction was held to be properly denied in *Lawrenceburgh & Upper Mississippi Railroad Co. v. Montgomery*, 7 Porter (Ind.), 475, the court holding that in a suit brought against a railroad for an injury occasioned by a collision, it was not sufficient for the company to show that the plaintiff was acting at the time in disobedience of a proper order to secure his safety, but that it should also appear that the injury was occasioned by such disobedience. In *Watson v. Northern Railway Co. of Canada*, 24 U. C. R. 98, the plaintiff travelling in the defendants' train on a passenger ticket, went into the express company's compartment of a car. While there, owing to the negligence of the defendants' servants, the train, which was stationary, was run into by another coming up behind it, and the plaintiff's

* Reported 7 C. L. J. N. S. 274.

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arm was broken. No person in the passenger cars was seriously injured. It was proved that notice that the passengers were not allowed to ride in the baggage-car was usually posted upon the inside of the door of the passenger-cars, but it was not distinctly shown that it was there on that day. The jury found that the plaintiff was wrongfully in the car, but that he was not told where to go when he bought his ticket, nor did the conductor order him out, and so he was not to blame. "In my opinion," observes Draper, C. J., "the jury were warranted in finding that the plaintiff did not so contribute (to the injury) as to deprive him of the right to recover. Giving the fullest weight to the considerations urged for the defence—such as the ticket which the plaintiff had, the notices stated to have been kept up in the cars, conceding the plaintiff saw them, though it is not proved—I do not think they preclude the plaintiff from recovering, when the injury he sustained was occasioned by a collision resulting entirely and directly from the gross negligence of the defendants' servants." In *O'Donnel v. Alleghany Valley Railroad Co.*, 59 Penn. 239, in a suit by an employee of a railroad company, who held the relation of a passenger, the court charged that the baggage-car is an improper place for a passenger to ride—whether the rule against it was communicated to him or not, if he left his seat in a passenger-car and went into the baggage-car, it was negligence which nothing less than a direction or an invitation of the conductor could excuse—and such invitation should not be inferred from his having ridden there frequently with the knowledge of the conductor without his objection. Held to be error.

That a railroad corporation cannot repudiate the acts of its agents so as to free itself from responsibility for their negligence, was held in *Lackwanna & Bloomsburgh Railroad Co. v. Chenoweth*, 6 Am. Law Reg. N. S. 98, when the agents of a railroad company, contrary to the instructions and rules of the company, at the request of the owner of a freight car, attached it to a passenger car, the plaintiff agreeing to run all risks, the plaintiff having sustained a loss by the negligence of the defendant, brought his action for compensation. The same defence was attempted as in the case at bar. The plaintiff was not a trespasser, "for," observes Thompson, J., "he was there by permission, and under the contract of parties competent to give him authority to be there. * * * When, therefore, they (the defendants) consented to hitch on his (plaintiff's) car to the passenger train, even at his urgent solicitation—and we have not a particle of evidence that other inducements were held out to do the act, excepting freedom from responsibility as a consequence of the attachment—we must presume it was done with a view to the compensation to be paid on the one hand, and the usual care to be exercised on the other. The argument, however, is, that the plaintiff was guilty of such a wrong in asking for permitting his car to be attached, that whether the act contributed to the disaster or not, he is to be treated as a trespasser, and not entitled to any compensation for injuries not wilfully done. We think this is not the law, unless, in a case where the will of an agent is

controlled and subverted by improper influences, he is induced to do that which is manifestly beyond the scope of his powers. That there was a regulation against running freight trains with passenger-cars may be admitted, although it was not properly proved, yet that neither proved that it might not be safely done, nor that if the company undertook to do it, they might lay aside the duty of care, and commit such cases to the guardianship of chance."

When a railroad company admits passengers into a caboose-car attached to a freight train, to be transported as passengers, and takes the customary fare for the same, it incurs the same liability for the safety of the passengers as though they were in the regular passenger coaches at the time of the occurrence of the injury: *Edgerton v. N. Y. & H. Railroad Co.*, 39 N. Y. (12 Tiffany) 227. In *Carrol v. N. Y. & N. H. Railroad Co.*, 1 Duer, 571-578, "the plaintiff," remarks Bosworth, J., "took a seat in the post-office apartment of the baggage-car. The position was injudiciously chosen, and it may be assumed that he knew it to be a far more dangerous one than a seat in a passenger-car. He took it with the assent of the conductor. He was not there as a trespasser, or wrongfully as between him and the defendants. So far as all questions involved in the decision of this action are concerned, he was lawfully there." His being there was not such negligence as would exonerate the defendants from the consequences of their negligence or want of care.

The plaintiff was not entitled by law to be carried on the freight train contrary to the regulations of the defendant's company. They might have refused to carry him, and have used force to remove him from the train. Not doing this, nor even requesting him to leave, but suffering him to remain, and receiving from him the ordinary fare, they must be held justly responsible for negligence or want of care in his transportation.

The question before the court was whether the defendants were liable at all as common carriers. The defence was based entirely upon a regulation of the company. There was no question raised as to the general obligations of carriers. Indeed none is raised at the argument. The counsel for defendants rest their defence on the rules of the company. The plaintiff had paid the usual fare of a first-class passenger. The defendants had received it, and had undertaken the transportation of the plaintiff in their freight train, during the course of which he was injured by their neglect or want of care. Under such circumstances, the judge said that they could not "plead their regulation in release of their ordinary liabilities, but they were just as liable as if it had been a passenger train, and as if there had been no notice, provided plaintiff was not guilty of any fault or want of ordinary care himself."

Undoubtedly a passenger taking a freight train takes it with the increased risks and diminution of comfort incident thereto, and if it is managed with the care requisite for such trains, this is all those who embark in it have a right to demand: *The Chicago, B. & Q. Railroad Co. v. Hazard*, 26 Ill. 278. "We have said in *The Galena & Chicago Union Railroad Co. v. Fay*, 16

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Ill. 568," observes Breeze, J., "that a passenger takes all the risks incident to the mode of travel, and the character of the means of conveyance which he selects, the party furnishing the conveyance being only required to adapt the proper care, vigilance and skill to that particular means; for this, and this only, was the defendant responsible. The passengers can only expect such security as the mode of conveyance affords."

If there was any peculiar risk incident to transportation on a freight train, the counsel should have called the attention of the court to such special difference, whatever it may be. But "the responsibility of a railroad company for the safety of its passengers does not depend on the kind of cars in which they are carried, or on the fact of payment of fare by the passenger:" *Ohio & Miss. Railroad Co. v. Mahling*, 30 Ill. 9. "The evidence," says Walker, J., in that case, "shows that the road had been carrying passengers on their construction trains, and they must be held to the same degree of diligence with that character of train as with their regular passenger coaches, for the safety of the persons and lives of their passengers."

If the defendants claimed that they might exercise a diminished degree of caution arising from the character of the train, they should have requested a corresponding instruction.

The cases to which our attention has been called, so far as we have been enabled to examine them, are inapplicable. In *Lygo v. Newbold*, 9 Ex. 302, the plaintiff contracted with the defendant to carry certain goods for her in his cart. The defendant sent his servant with his cart, and the plaintiff, by the permission of the servant, but without the defendant's authority, rode in the cart with her. On the way the cart broke, and the plaintiff was thrown out and injured. Held, that as the defendant had not contracted to carry plaintiff, and as she had ridden in the cart without his authority, he was not liable for the personal injury she had sustained. But in that case it does not appear that the defendant was a common carrier—that he undertook to carry, or received, or was to receive, any compensation for the carriage of the plaintiff.

In *Lucas v. New Bedford & Taunton Railroad Co.*, 6 Gray, 65, it was held that a person who entered the cars of a railroad corporation, not as a passenger, but for the purpose of assisting an aged and infirm relative to take a seat as a passenger, must, in order to maintain an action against the corporation for an injury sustained while leaving the cars, show that he exercised due care, that the corporation was wanting in ordinary care, and that such negligence was the cause of the injury; and if he attempts to leave the cars after they have started, or, finding them in motion as he is going out, persists in making progress to get out, he cannot maintain such action, if his attempt causes or contributes to the injury, even if the corporation give him no special notice of the time of departure of the cars, and are guilty of negligence in starting the cars, and in a jerk occurring after the first start, which negligence also contributes to the injury. But in that case the plaintiff was not a passenger; he was not there for the purpose of being transported. The ser-

vants of the corporation could not know, and were not obliged to know, the purpose for which he came aboard. Besides, the plaintiff must show due care. The implication from the case is, that with due care on the part of the plaintiff, and negligence on the part of the corporation, the action was maintainable, and is adverse to the defendants.

Exceptions overruled.

KENT, DICKERSON, BARROWS, and TAPLEY, JJ., concurred.

It cannot be denied that the foregoing case is one of very great interest to the profession; and the opinion of the learned Chief-Justice is drawn up with great care and after very deliberate examination of the cases bearing upon the questions involved. We are all accustomed to accept the opinions of that court with so much deference and respect, that we question whether any comment on our part will be regarded as of much account. But we cannot disguise the impression, made upon our own mind by the reading of the statement of the trial in the court below, that the defendants might very naturally have regarded the instructions of the learned judge as requiring of them a somewhat severe measure of duty. The opinion of the Chief Justice in the Supreme Court seems to escape most of the rigors of the case, as presented in the court below, by way of presumption or inference from the admitted facts in the case. It seems to be assumed, both in the court below and in that of last resort, that the plaintiff was rightfully upon the train, at the time the damage or injury occurred, and that the defendants had made themselves common carriers of passengers so far as the plaintiff was concerned. And if that point is clearly established in the case, there would seem to be no question in regard to the soundness of the views presented in the opinion.

But the case of a passenger injured upon a freight train deserves unquestionably a very different consideration from one, when the injury occurs upon a passenger train. Upon the latter the conductor represents the company to the fullest extent as regards the entire subject of receiving and transporting, as well as the safe delivery of the passengers. That is his regular employment, and in all that pertains to such employment the conductor stands in the place of the company; and his acts, and his declarations accompanying such acts, will bind the company to the fullest extent. And this is true even as to his omissions and the concessions thereby fairly implied. As, for instance, when the passengers are allowed, by the conductor, to pass from car to car, while the train is in motion, or to stand upon the platforms, or to sit in the baggage or express cars, there can be no fair question that the company will be bound by his acts.

And we should not be inclined to doubt, that where this, or any similar freedom, is constantly allowed the passengers upon passenger trains, without objection or remonstrance on the part of the conductors, the company must be regarded as having acquiesced in the practice, although in conflict with their general regulations, properly advertised in the cars. We suppose some such relaxation is found indispensable on the American railways, in order to keep the peace

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with the passengers. For among us there is a considerably numerous and influential class of passengers, who insist upon almost perfect freedom of locomotion and observation, in all places and under all circumstances. The propensity proceeds doubtless from different motives, in different persons. Some do it from mere listlessness and unrest; others from curiosity and to satisfy a morbid sense of inquisitiveness; and others still to show they can do it, and not suffer detriment. There are doubtless many other reasons, as to find out friends and acquaintances, &c. But certain it is, no conductor can control or hinder it, if he were ever so much disposed to do so. People, in this country, will insist upon making all the railway tracks common highways for foot passengers; and equally upon climbing about in all directions upon moving passenger trains; and there seems to be no remedy but to submit to it. They all feel that it is unsafe for others, but indispensable for themselves to do so. And if railway companies are compelled to submit to it, all we can say is, that the blame cannot be thrown upon their servants, but must rest upon themselves. But the cases of passengers and strangers are by no means analogous. There is, for instance, no implied permission to a stranger to walk upon a railway track because the road-master does not drive him off, as he doubtless might if he chose. But having no responsibility in the matter, he is not obliged to do so; and no implied assent is the result of his omission to do so. But in the case of passengers it is different. They are, for the time, under the control of the conductors, whose duty it is to put them in a safe place, and keep them there. And if they attempt to violate the rules of the company, by riding upon the platforms, or in the baggage car, or in any other mode out of the ordinary and safe course, it is the right and the duty of the conductors to forbid them, in the most peremptory manner, and if they persist in their course, to compel them to desist, if need be, by force. And if the conductors do not exercise their right and duty in these particulars, they must be regarded as having assented to the course pursued by the passengers, subject, of course, to the increased risk thereby incurred being borne by such passenger. And, subject to this qualification, the act of the conductor, upon a regular passenger train, must be regarded as binding the company to an assent to carrying the passenger in that mode. And the same would be true, probably, if some foolhardy passenger (of whom there are multitudes all over the country, especially during the summer excursions,) in search of new adventures, should insist upon standing upon his head, or lying at full length upon the platform of the cars during the entire passage. The company must be regarded as bound by the act of the conductor, if he did not forcibly prevent it, at least to the extent of stipulating to carry the passengers in that mode, as safely as it was practicable to do in that peculiar mode of transportation. If the passenger was damaged in consequence of his foolhardiness, in persisting in riding in that particular mode, he could not recover, of course. But if he could show that his peculiar mode of riding did not contribute to his injury, but that it resulted

wholly from the negligence of the company, he might unquestionably still recover.

But as we understand the settled law upon the subject, in regard to passenger transportation upon freight trains, the rule of implication, as against the companies, resulting from the acts, declarations, and acquiescence of the conductors, is entirely different,—we might say the reverse of what it is upon passenger trains. Upon the freight trains of a railway company the conductors have no implied authority to bind the company by allowing persons to be carried as passengers. Every one is presumed to have notice that railways do not carry passengers upon their ordinary freight trains, and that if one is allowed to travel upon them as a passenger, it is conceded as a favor, and subject to the implied condition that he will incur the additional risk and inconvenience necessarily incident to that mode of transportation. The rule has been often declared and is recognized in the principal case as well as in many others: *Murch v. Concord Railway*, 29 N. H. 9, where the question is discussed and very fairly presented by Mr. Justice Bell.

“The stage proprietor is a carrier of passengers by his coaches, but he does not thereby become a common carrier of passengers by his baggage waggons, if he carries on that business at the same time. Both the companies and the individuals, in these cases, are bound to their customers by the same duties relative to their freight trains and baggage waggons, and have the same rights as to the roads over which they travel, as if they had no connection with the business of common carriers of passengers. * * * The first question which arises upon the point is, whether the railroad companies have made themselves common carriers of passengers by the freight trains? * * * It is very clear that a waggoner, who occasionally carries a passenger upon his waggons as a matter of special accommodation and agreement, does not thereby become a common carrier of passengers. He only becomes such when the carrying of passengers becomes an habitual business. * * * Upon the evidence stated in the case that ‘both roads had been in the habit of occasionally transporting some passengers upon the freight trains, when they were anxious to go,’ we think we should not be justified in saying that they were common carriers of passengers upon their freight trains”: *Elkins v. Boston & Maine Railway Co.*, 3 Foster, 275.

It seems to us that this presents the question in its true light, and we should seriously question whether a conductor of a freight train can fairly be said to have any authority to bind the company, by accepting passengers upon his freight trains. It seems to us that justice to the companies requires that any one who rides upon a freight train should be required to show permission to do so from the superintendent of the road, just as much as if he were riding upon the engine, in order to show himself rightfully upon the train. The conductor of a freight train has no more right to accept passengers for transportation, than has the baggage-master or the engineer upon a passenger train to allow passengers to ride with them in their departments. We have always maintained the neces-

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sity of holding railways to the strictest responsibility in regard to passenger transportation. But we should, at the same time, require passengers to submit obediently to all the just requirements of the companies, and if they needlessly and understandingly departed from them, to accept the consequences in patient submission. If railway companies run passenger cars upon their freight trains, or in any other mode invite passengers to accept passage upon them, the company are bound to the same degree of responsibility as if they carried them in regular passenger trains. But where this is only occasional and for the accommodation of the passenger, the rule of construction should, we think, be in favor of the company, and the passenger be required to show clearly that he rode in that mode by the consent of the proper agent of the company, which in this case, it seems to us, the conductor of the freight train was not. But we urge this view with hesitation against so high authority.

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DIGEST.

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FOR MAY, JUNE, AND JULY.

(Continued from page 312.)

MARITIME LIEN.

The English Admiralty Court has jurisdiction over claims for necessities supplied to any ship elsewhere than in the port to which she belongs. In a suit for sums due for work and supplies furnished a ship subject to a mortgage, *held*, that a material-man had not a maritime lien, but only an action *in rem*, with a lien from the time of beginning suit, and that the mortgagee's claim had priority.—*The Two Ellens*, L. R. 3 Ad. & Ec. 845.

MATERIAL-MAN.—See MARITIME LIEN.

MISDEOR.—See DEVISE, 1.

MISDESCRIPTION.—See LEGACY, 1.

MORTGAGE.

1. An inn-keeper mortgaged his lease to a brewer to secure £1250 advanced, and any further sum, not to exceed £1500 in all. The same day the inn-keeper charged his lease with £200 to the distiller, "subject only to the security on the premises already given." The distiller had notice of the mortgage to the brewer. The brewer made subsequent advances with knowledge of the distiller's charge. *Held*, that the mortgage to the brewer covered only the advances precedent to notice of the distiller's charge, and that no custom of London to the contrary among brewers and distillers could change this priority.—*Mensies v. Lightfoot*, L. R. 11 Eq. 459.

2. A. agreed to advance a certain sum by way of mortgage on certain premises, "at 5

per cent. per annum, and that the same shall not be called in for the next five years." In a suit for specific performance, by executing a mortgage deed in accordance with the agreement, *held*, that the deed should contain a condition for re-entry on failure to pay interest.—*Seaton v. Twyford*, L. R. 11 Eq. 591; 7 C. L. J. N. S. 106.

See DEOREN; DEVISE, 1, 6; MARITIME LIEN; SETTLEMENT; VOTER, 1.

NECESSARIES.—See MARITIME LIEN.

NEGLECTOR.

1. A. travelled daily between L. and H. The train stopped before arriving at the station of H., so as to bring the carriage in which was A. opposite a pile of rubbish. "H." was called out, and shortly after, "Keep your seats." The train then moved on to the station. A, who was very near-sighted, got out when the train first stopped, fell, injured himself, and died in consequence. *Held*, (Kelly, C.B., Willes, and Keating, JJ., dissenting) that there was no evidence of negligence in the railway company to be left to the jury. Even if there were such negligence, the conduct of A. must be considered in deciding whether there was a proper case to be submitted to the jury. (By the whole court)—calling out "H." was not of itself an invitation to alight.—*Bridges v. North London Railway Company*, L. R. 6 Q. B. (Ex. Ch.) 377.

2. A company was authorized by Act of Parliament to build a flooring above and over defendant's railway, the defendant having no control over the work. Such work had often been done before over roads without accident. *Held*, that the railway company was not liable for an accident happening in the course of such work, whereby a passenger was killed. The latter company was not bound to assume such work would be done negligently, and guard against possible accident.—*Daniel v. Metropolitan Railway Co.*, L. R. 5 H. L. 45.

See BILLS AND NOTES, 2; LANDLORD AND TENANT; RAILWAY.

NONSUIT.

When the judge is of opinion there is no case to go the jury, he should direct a nonsuit, giving leave, if necessary, for the plaintiff to move to enter a verdict in his favor. He should not direct a verdict for plaintiff, with liberty to defendant to enter verdict, should the judges having power to draw inferences of fact, be of opinion there was no case for the jury on the evidence.—*Daniel v. Metropolitan Railway Co.*, L. R. 5 H. L. 45; s. c. L. R. 3 C. P. 216, 591.

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NOVATION.—*See* COMPANY.

PARTIES.—*See* EXECUTORS AND ADMINISTRATORS, 8, 4.

PARTNERSHIP.

A. and B. were partners, and indebted to C. B. being indebted to C. on private account, paid C. £1000 of the partnership money, in discharge of his private debt, without A.'s knowledge or consent. B. became bankrupt, and the firm dissolved. A. then gave bills to C. for £5000, the sum apparently due by the books; but before maturity of the bills, discovered the above misappropriation of partnership money. A. paid the bills at maturity, giving C. notice that he paid under protest, and only because his father's name was on the bill as drawer. A. then brought action to recover £1000, paid under mistake of fact. *Held*, that he was entitled to recover.—*Kendal v. Wood*, L. R. 6 Ex. (Ex. Ch.) 243.

See COMPANY, 8.

PATENT.

1. Where a patentee had a manufactory in both England and France, it was *held* that a purchaser buying in France had an implied license to sell in England. A patentee, bringing suit for infringement, must prove both that the article was sold, and that it was not manufactured by himself.—*Betts v. Willmott*, L. R. 6 Ch. 289.

2. Where letters-patent are sought for an invention identical in part with an existing patent, they will not be granted, although the validity of the existing patent is in dispute.—*Ex parte Manceaux*, L. R. 6 Ch. 272.

3. A servant filed a provisional specification for an invention, after which the master filed specifications, and obtained letters-patent; under the circumstances, letters-patent were granted to the servant, bearing the date of his provisional specification.—*Ex parte Scott & Young*, L. R. 6 Ch. 274.

4. Where a design for ornamenting a woven fabric was protected by registering a pattern, an imitation, to all outward appearance identical, though not actually so, was held an infringement.—*McCrea v. Holdsworth*, L. R. 6 Ch. 418. *See* L. R. 2 H. L. 880.

5. Action for infringement of an English patent. Defendant used the article in Scotland, and transmitted it to his agent in England for transshipment. *Held*, that this constituted an infringement.

The burden of proof being upon the plaintiff, courts of equity will grant him limited orders of access to machinery, &c., of the alleged pirate of the invention.

It is not enough that there has been a general disclosure of an object to be attained in a former patent, unless there is a specification pointing out the mode of attaining it.

Evidence of scientific men, experimenting under a first patent, to examine whether thereunder an after-patented article can be produced, and evidence of what was done in the trade between the dates of the two patents, is admissible.

Patent for a material, and a particular use of the material, is no ground for avoiding the patent.

A decree in a patent suit cannot be for inquiry as to damages and account of profits, as the latter would condone the former.—*Neilson v. Betts*, L. R. 5 H. L. 1; s. c. L. R. 3 Ch. 429.

PAYMENT.—*See* APPROPRIATION OF PAYMENTS.

PERFORMANCE.—*See* SPECIFIC PERFORMANCE.

PERPETUITY.

1. Devise in trust "for all the children of my said daughter who shall attain the age of twenty-one years, and the lawful issue of such of them as shall die under that age, leaving lawful issue at his . . . decease, . . . which issue shall afterwards attain the age of twenty-one years, or die under that age, leaving issue living at his . . . decease, . . . but such issue to take only the share which his parent . . . would have taken if living." The daughter left five sons who attained twenty-one. *Held*, that the five children took as a class, and the devise to them did not conflict with the rule against perpetuities, which would only avoid such part of the devise as fell within it.—*In re Moseley's Trusts*, L. R. 11 Eq. 499.

2. A testator devised, on failure of limitations for life and in tail, in trust for the children of A., who shall be then living, and the issue of such of them as shall be then dead, leaving issue, . . . share and share alike, but so as the issue of such of the children" of said A. "as shall be then dead shall have no greater share than their, his, or her deceased parents would have had if living." And a second part to P., and after her decease to her children "then living;" and so on as with A. Proviso, that whatever sums should become payable "to the issue of my late sister A., and my sister P., . . . and any one or more of such issue as shall be then dead having left lawful issue, then the issue of such issue as shall be so dead shall have the share to which their, his, or her parent would have been entitled if living." *Held*, that the proviso was a mere repetition of the divesting clause in favor of the family of P.; and that

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"then living," in the devise to the issue of A., meant children living on failure of the previous limitations; and that "then living," in the devise to the issue of C., meant children living at P.'s death. Also, that the two living children of P., and the issue of a deceased child, took one-third respectively as tenants in common; but that said issue took jointly among themselves.—*Heasman v. Pearce*, L. R. 11 Eq. 522.

See LEGACY, 2.

POSSESSION.—See BAILMENT; EVIDENCE.
POWER.

A. purported to appoint by will under a certain power, "and every other power enabling me in that behalf." The power referred to was void; but by a different power, which A. supposed void, A. could appoint by deed. *Held*, the latter power might be exercised by will; and that the court would carry out the intentions of the donee of the power, though in execution of a power not referred to, and not in the mind of the donee.—*Bruce v. Bruce*, L. R. 11 Eq. 371.

See APPOINTMENT; TRUST.

PRESUMPTION.

Testator bequeathed to A., making B. his residuary legatee. A. went to Australia, and was heard from last in 1859. Testator died in 1860. *Held*, that seven years having elapsed since A. was heard from, the presumption was that he was dead, but that the burden lay on those claiming under A., and against the residuary legatee, to show that A. died after the testator.—*In re Lewes Trusts*, L. R. 6 Ch. 356; s. c. L. R. 11 Eq. 236. See *In re Phene's Trusts*, 6 C. L. J. N. S. 101.

See AGE.

PRINCIPAL AND AGENT.

T. consigned goods to N., with a price list; and N. sent in a monthly account of the goods which he had sold, and the next month paid the price on the list. N. did not specify to T. the particular contracts, nor names of purchasers, nor price at which he sold; and he frequently changed the goods, by dyeing, &c., before sale. *Held*, that N. did not sell as agent to T., and that the money he received was subject to no trust for T.—*In re Neville*, L. R. 6 Ch. 397.

See BILLS AND NOTES, 2; PARTNERSHIP;
STOCK EXCHANGE; ULTRA VIRES.

PRIORITY.—See MORTGAGE, 1.

PRIVILEGED COMMUNICATION.—See INSPECTION OF DOCUMENTS.

PRIVITY.—See CONTRACT, 2.

PROMISSORY NOTE.—See BILLS AND NOTES.

PROTEST.—See PARTNERSHIP.

PROVISO.—See CONDITION.

PROXIMATE CAUSE.—See FRANCHISE.

PUBLICATION.—See LIBEL.

RAILWAY.

Plaintiff took a ticket from defendant railway company, from A. to C. At B., between A. and C., said company's line joined the line of another company, over which the defendants had, by act of Parliament, running powers to C. on payment of tolls, the traffic arrangements being with the second company by said act. Defendants' train ran into a train of the other company, through negligence of the latter, and the plaintiff was injured. *Held*, that the defendants were liable for such negligence. *It seems* the contract is that reasonable care shall be exercised by all by whom such care is necessary, for reasonably safe conveyance to the end of the journey.—*Thomas v. Rhymney Railway Co.*, L. R. 6 Q. B. 286; s. c. L. R. 5 Q. B. 226.

See FRANCHISE; NEGLIGENCE.

REMAINDER.—See DEVISE, 4; LEGACY, 2.

REMAINDER-MAN.—See APPOINTMENT.

RENT-CHARGE.—See TAX.

RES ADJUDICATA.—See BANKRUPTCY, 1; COURT.

RESERVATION.—See FORFEITURE.

RESIDENCE.

A. had lodgings at E., where his family resided; but, being employed at M., he was furnished lodging there and slept there, though not obliged to do so, with the exception of one or two nights a week, when he slept at E. *Held*, that A.'s residence was at E.—*Taylor v. Overseers of St. Mary Abbott*, L. R. 6 C. P. 309.

RESIDUARY ESTATE.

A testator domiciled abroad made his will and died in London, and left his estate to trustees to invest in British consols, and from their income to pay two annuities, the trustees to hold in their names a sufficient amount of consols to secure payment of the annuities; subject as aforesaid, his residuary estate in trust for his children. On the death of one of the annuitants, *held*, that the sum reserved to answer the annuity was part of the residuary estate, and not subject to succession duty.—*Callanane v. Campbell*, L. R. 11 Eq. 378.

See DEVISE, 4.

RESIDUARY LEGATEE.—See DEVISE, 5; EXECUTORS AND ADMINISTRATORS, 1; LEGACY, 2; PRESUMPTION.

SALE.—See BANKRUPTCY, 2; PRINCIPAL AND AGENT.

SEAL.—See BILLS AND NOTES, 3.

SEIZURE.—See BANKRUPTCY, 2; EXECUTION.

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SEPARATION.—*See JURISDICTION.*

SET-OFF.

A bank accepted a bill for £7798 against cotton, the bills of lading of which were delivered to the bank on acceptance. The bank handed the bills of lading to the owner of the cotton, who obtained from his brokers an advance of £6000 thereon, and paid the same to the bank. The brokers subsequently sold the cotton, and retaining £6000, paid a balance of £574 to the holder of the bill of exchange. The bank was ordered to be wound up, and the holder of the bill proved the whole amount against the bank. *Held*, that the bank could not set off the £574 against the dividend payable to the holder, but, *it seems*, that the amount proved should be reduced by that sum.—*Leech's Claim*, L. R. 6 Ch. 388.

See BANKRUPTCY, 3.

SETTLEMENT.

The owner of an estate, worth \$1800, made a post-nuptial settlement upon his wife, receiving as an inducement thereto £150, advanced on his promissory note. In the settlement no mention was made of the advance. *Held*, that there was a sufficient consideration to support the settlement under Stat. 27 Eliz. chap. 4, against a subsequent mortgagee.—*Bayspools v. Collins*, L. R. 6 Ch. 228.

See LEGACY, 2; *TRUST*; *VENDOR AND PURCHASER*, 1.

SHAREHOLDER.

The plaintiff signed an agreement as follows: "We, the undersigned, hereby agree, upon the passing" of a certain Act, "to subscribe for" certain shares. The act was passed, and shares were allotted to plaintiffs, but with no notice thereof. By another Act, subscribers to the capital of a company are deemed shareholders. *Held*, that the plaintiffs were subscribers, and liable on a call.—*Burke v. Lechmere*, L. R. 6 Q. B. 297.

See COMPANY, 1.

SHELLEY'S CASE, *RULE IN*.—*See DEVISE*, 9.

SHERIFF.—*See EXECUTION*.

SPECIFICATION.—*See PATENT*, 3, 5.

SPECIFIC PERFORMANCE.

A. contracted to repair a vessel, and, in case of failure to complete the work, to allow the owners to enter his ship-yard and complete the same. A. became bankrupt. *Held*, that the court could not specifically enforce the whole contract, and would therefore not enforce performance of a part; and an injunction against the bankrupt's assignee's selling the yard was refused, and the owners denied

permission to enter the same and complete the vessel.—*Merchants' Trading Co. v. Banner*, L. R. 12 Eq. 18.

See MORTGAGE, 2; *VENDOR AND PURCHASER*, 1.

STATUTE.—*See BANKRUPTCY*; *FOREIGN ENLISTMENT ACT*; *FORFEITURE*; *FRANCHISE*; *HUSBAND AND WIFE*; *INFORMATION*; *SETTLEMENT*; *VOTER*.

STATUS.—*See DOMICILE*.

STOCK EXCHANGE.

Whoever enters into contracts on the Stock Exchange through his broker, is bound by its rules.—*Duncan v. Hills*, L. R. 6 Ex. 255.

See CONTRACT, 2.

STOPPAGE IN TRANSITU.—*See BILL OF LADING*, 2. *SUBSCRIBER*.—*See SHAREHOLDER*.

SUCCESSION DUTY.—*See RESIDUARY ESTATE*. *SURETY*.

The sureties on a bond covenanted that they or either of them should not be released by any arrangement which might be made, with or without their consent, between the principal and obligee for continuation or alteration of time of payment, or additional security. On failure by the principal to pay an instalment due on the bond, W. undertook to pay the whole amount due in case the principal should be unable to discharge the bond in a manner provided. W. had to pay the whole amount. *Held*, that each surety was liable to W. for a moiety thereof.—*Whiting v. Burke*, L. R. 6 Ch. 342; s. c. L. R. 10 Eq. 539.

TAX.

A covenant in a lease to pay "all taxes and assessments," "except level tax, property tax, and land-tax," does not include a tithe rent-charge.—*Jeffrey v. Neale*, L. R. 6 C. P. 240.

TELEGRAPH.—*See FOREIGN ENLISTMENT ACT*.

TENANCY IN COMMON.

A testator devised his real estate to his brother and sister and their heirs, "but in case my said brother should die in the lifetime of my said sister without leaving any issue, his share to my said sister and her heirs." The sister survived the testator, and the brother died leaving a son. *Held*, that the words of the devise created a tenancy in common; and that the share lapsing to the brother's son was chargeable with half the testator's debts.—*Ryves v. Ryves*, L. R. 11 Eq. 539.

See PERPETUITY, 2.

TENANT FOR LIFE.—*See APPORTIONMENT*, 1.

TESTIMONY.—*See COSTS*; *EVIDENCE*.

TITHE.—*See TAX*.

TITLE.—*See LIMITATIONS*, *STATUTE OF*; *VENDOR AND PURCHASER*, 1, 3.

DIGEST OF ENGLISH LAW REPORTS.

TRADE-MARK.

Where a first inventor had for many years called his manufacture the "original," an injunction was granted restraining another manufacturer using the above word.—*Cocks v. Chandler*, L. R. 11 Eq. 446.

TROYER.—See BAILMENT.

TRUST.

If a trustee commits a breach of trust by making improper investments, and such investments are made the subject of a settlement by the Court of Chancery, the *cestuis que trustent* under the settlement are not precluded from charging the trustee with said breach of trust.

A testator gave to his wife and brother, or other the trustees for the time being, property in trust, with power to sell and invest at discretion. *It seems* that the discretion ceased with the death of the brother.—*Zambaco v. Cassavetti*, L. R. 11 Eq. 439.

See BANKRUPTCY, 3; DEVISE, 4; PRINCIPAL AND AGENT.

ULTRA VIRES.

Plaintiff let money to a society having no power to borrow, and received a certificate, signed by two directors, that plaintiff had deposited the money, and that it would be repaid with interest, on notice. *Held*, that the certificate was an implied warranty of authority to bind the society, and that the directors might be sued for damages for breach thereof.—*Richardson v. Williamson*, L. R. 6 Q. B. 276.

VALUE.—See VOTER, 1.

VENDOR AND PURCHASER.

1. On bill for specific performance filed by a vendor, who had made a voluntary settlement, the vendee having taken possession as purchaser, paid off a mortgage, and taken conveyance of the legal estate from the mortgagee, with possession of the title-deeds, and being willing to complete the purchase on receiving a good title, *held*, that the plaintiff was entitled to a decree notwithstanding the settlement.—*Peter v. Nicolls*, L. R. 11 Eq. 391.

2. By written agreement A. contracted to sell a lot of land to B. It was subsequently agreed between A. and B. that said lot should not be sold without a second lot adjoining. B. agreed to sell the first lot to C., who had knowledge of the above facts, subject to the provisions of B.'s agreement with A. C. refused to purchase both lots, and thereupon A. conveyed them to D., who knew of the agreement between A. and B., and its assignment to C. *Held*, that the conveyance to D. would

not be sent aside.—*Crabtree v. Poole*, L. R. 12 Eq. 18.

3. A vendor agreed to send a purchaser an abstract of title within a certain time, and the purchaser agreed to make any objections thereto within a period which was made of the essence of the contract. The estate in question was subject to a reservation of minerals. The abstract was not delivered within the time agreed. *Held*, that the above objection to the title was fatal; and that the vendor not having delivered an abstract according to the agreement, the time within which objections might be taken would lie with the court.—*Upperton v. Nickolson*, L. R. 6 Ch. 486; s. c. L. R. 10 Eq. 228.

VERDICT.—See NONSUIT.

VOTER.

1. The qualification of a voter is by statute, "free land or tenements to the value of 40s. by the year, at the least, above all charges." A. owned tenements subject to a mortgage, upon which he paid yearly, in addition to interest, a further sum, in reduction of the mortgage debt; and these two amounts were more than the annual value of the tenements: but such value was more than 40s. greater than the interest alone. *Held*, that the interest only was to be subtracted from the yearly value of A.'s estate, and that he was qualified to vote.—*Rolleston v. Cope*, L. R. 6 C. P. 292.

2. "Any part of a house, occupied as a separate dwelling-house," is a "dwelling-house" for the purpose of qualification of voters. A. occupied one room in a house, having use of staircase, privy, and ashpit, in common with other tenants. The owner of the house did not reside on the premises. The court was divided as to whether A. occupied a separate dwelling-house.—*Thompson v. Ward*; *Ellis v. Burch*, L. R. 6 C. P. 327.

WAGES.—See DECREE.

WAIVER.—See EJECTMENT.

WARRANTY.—See ULTRA VIRES.

WAY.—See DEDICATION.

WILL.

Testator owing real estate in England and Scotland, devised "all the rest, residue, and remainder of my real estate situate in any part of the United Kingdom, or elsewhere," in trust for his two sons. The will was incompetent to pass the Scotch estate, which descended to the eldest son as heir. *Held*, that the heir must elect between the Scotch estate and the benefits under the will.—*Orrell v. Orrell*, L. R. 6 Ch. 302.

REVIEWS.—IMPERIAL AND COLONIAL LEGISLATION.

See AGE; APPOINTMENT; APPOINTMENT, 2; CODICIL; COSTS; DEVISE; EXECUTOR AND ADMINISTRATOR, 1, 4; HUSBAND AND WIFE; ILLEGITIMATE CHILDREN, 1, 2; LEGACY; PERPETUITY; POWER; RESIDUARY ESTATE; TENANCY IN COMMON.

WORDS.

"And."—See DEVISE, 2. "Assigns."—See DEVISE, 9. "Born or to be born."—See DEVISE, 9. "Issue."—See PERPETUITY, 2. "Or."—See DEVISE, 2. "Original."—See TRADE-MARK. "Person."—See CONDITION. "Separate Dwelling-house."—See VOTER, 2. "So far as the rules of law and equity will permit."—See LEGACY, 2. "Taxes and Assessments."—See TAX. "Then living."—See PERPETUITY, 2. "Yearly Value."—See VOTER.—*American Law Review.*

REVIEWS.

AMERICAN LAW REVIEW. Little, Brown & Co. Boston.

The October number commences Vol. 6. The articles are: I. Estoppel of a Tenant to deny his Landlord's Title: A long and apparently carefully written essay, citing the English and American authorities. II. Misunderstandings of the Civil Law. III. Doubtful points under the Bankrupt Law. IV. Married Women. A review of Mr. Bishop's book on that subject. A very readable article, which shews plainly that Mr. Bishop's book must contain an interesting though quaint discussion of an interesting subject.

LAW MAGAZINE AND LAW REVIEW. Butterworth's: London.

The contents of the August number are: I. The Law of Fixtures, its historical development and present state. Part 2.—II. Sanitary Legislation, considering particularly the recent report of the Royal Sanitary Commission. III. On the Transmission of Bills of Lading and other negotiable instruments by Telegraph. IV. County Court Commitments, which is an appeal for their abolition, founded upon arguments which prove only that the law simply requires a few amendments, or that it (the law) is administered harshly and without discrimination. V. The Law of Landlord and Tenant. VI. The Trial of Algernon Sidney. VII. Bankruptcy Business. VIII. A Critique on the Classification of Rights in the Insti-

tutes of Gaius and Justinian. IX. The Law of Distress, which we have reprinted. X. Prison Discipline and Reformatory Treatment, &c. &c.

The articles in the November issue, are: I. The Co-operative Societies' Act of 1871. II. Setting fire to goods in a dwelling-house. III. A Review of Williams' Notes to Saunders' Reports. IV. The Law of Pawnbroking. V. The House of Lords. VI. Legal Education. VII. The Statute of Frauds. VIII. Nationality and Domicile under the Conflict of Laws. IX. The late Right Hon. Sir John Rolt. X. Local Courts and the bounds of their jurisdiction, which we republish. It contains some hints which would occasionally be of use to those in authority; and it shews, on the other hand, that, in some respects, we are in advance of legislation in England. This, however, has happened before.

IMPERIAL AND COLONIAL LEGISLATION.

There is an obvious absurdity in an united empire sanctioning the existence of different laws on important subjects interesting alike to all parts of it. We have recently pointed out that there ought not to be one law permitting marriage with a deceased wife's sister prevailing in Australia, whilst a similar provision has been thrown out of the Imperial Legislature. We print conspicuously in another column a judgment delivered at Halifax, which discloses the fact that whilst we have our Carriers Act in this country, by the provisions of which carriers are protected from liability unless a premium is paid in proportion to the value of goods above £10, no such Act has been passed in our colony, and the Supreme Court has been compelled to hold that the owner of goods may be defeated of his remedy against a carrier if that carrier has declared that he will not be responsible at all.

Another branch of law is in a similar position, as we find from a carefully written paper in the *Canada Law Journal*, treating on Parliamentary Elections. There seems to be a general impression, says the writer, principally outside the Profession, that the Acts of Parliament relating to the law of Parliamentary elections in the Province of Ontario are so nearly identical with the laws of England, that the decisions of the English judges should be guiding rules in the colony. He adds, "A careful comparison, however, of the Imperial and Ontario statutes will show that, although in some instances the different sections of the separate Acts are word for word the same, yet they do differ in some points so very materially, that they might be said to alter the whole scope of the Act in that respect." This is perfectly plain, and this peculiar result is arrived at. Under our statute of 1854, a member loses his seat for bribery, treating, or undue influence. In the Ontario statute of 1868, a member would only lose his seat for offences committed against the sections of the Act prohibiting bribery by him-

IMPERIAL AND COLONIAL LEGISLATION.—POSTAL CARDS.

self or his agent. Treating and the exercise of undue influence were by that Act punishable only by the infliction of a money penalty. Then two other analogous Acts pass—the Imperial Act of 1868, and the Ontario Act of 1871 (the Controverted Elections Act). By the former Act it is provided that where bribery is committed with the knowledge of a candidate, he is held to be guilty of personal bribery. Thus our English law was carried as far as it would well go. The Ontario Act went in the same direction, and said that any candidate guilty of corrupt practices, which were defined as including bribery, treating and undue influence, illegal and prohibited acts in reference to elections, or any of such offences, as defined by Act of the Legislature, should lose his seat. The result is, that only in cases of bribery can the act of an agent affect the seat: in cases of treating and undue influence, it must be the personal act of the candidate himself. It is familiar to every one that this is not the law of England, and the act of the agent, whether it be connected with bribery, or treating, or undue influence, will equally affect the seat, rendering an election void. Why the law should be different in the two countries, it is very difficult to understand, more especially when it is considered that as regards bribery, the colonists are rather harder on the candidate than we are. It must be assumed, and we think rightly, that treating and undue influence are matters not so thoroughly within the control of a candidate. Bribery is rarely carried on unless the candidate himself supplies the necessary funds; whereas both treating and undue influence may be carried on at very little cost, and without the knowledge or consent of the candidate in any way whatever. But whilst the Ontario Act does not affect the seat of a member by the act of an agent in respect of treating or undue influence, it is very severe on him if he be found to have sanctioned or been guilty personally of any illegal practice.

We need not go more particularly into the distinctions between Imperial and Colonial legislation, and we will merely refer to the inconveniences which any difference at all is calculated to produce. All our now elaborate and important case law on the subject of Parliamentary elections is only applicable in Canada in an indirect way. The decisions are to be looked at carefully, with a view to the distinctions in the statutes of the colony and of the mother country. This ought not to be. The law of the empire on matters of imperial interest should be uniform. So far from this being the case, we find that we have different laws prevailing as regards marriage, the liability of carriers, and Parliamentary elections. No doubt there are other branches of the law, in which there is a want of agreement and uniformity. The extent of the evil should be accurately ascertained, and steps taken to remedy it; otherwise, it may prove to be of more consequence to imperial interests than may be generally supposed.—*Law Times*.

POSTAL CARDS.

May a person with impunity make use of the new postal cards to send his neighbour defamatory and scurrilous language concerning him? According to the daily papers, this question has been answered by a metropolitan magistrate in

the affirmative; but we cannot but think there must be some inaccuracy in the report. It is said a tradesman applied to Mr. Newton for a summons against a man who had sent him a libel on a post-card, and that the learned magistrate refused to grant it, on the ground that there was no more a publication of the contents of the card than there would have been had it been a sealed letter. We would caution any evil-disposed person from relying on this supposed decision as providing a safe and cheap mode for abuse and defamation. The first point to be noticed is, that ever since the time of Lord Mansfield it has been admitted law, that the sending a letter containing a libel to the party against whom it is made is a sufficient publication to sustain an indictment, although it would not support an action. In the case of *Reg. v. Burdett* (3 B. & A. 717), the court held that a delivery of a sealed letter containing a libel at the post-office is a publication there. The reason why an action will not lie on a libel when the only publication has been to the party libelled is, because the plaintiff could sustain no injury unless he himself communicated the libel, but this reason does not excuse the libeller from being prosecuted for the offence, the gist of the crime being not the injury to the individual, but the provocation and tendency to a breach of the peace. This is no obsolete doctrine. Within the last two years a man was sentenced at the Old Bailey for writing a libellous letter to and of the prosecutor. But we go a step further, and contend that there is a great difference between sending a letter in an envelope and writing a libel on a post-card, which can and probably will be read by clerks, letter carriers, domestic servants and others. It must be remembered that the annoyance caused to the recipient of the libel will arise from the suspicion that others have seen it, and in this way a nervous person's life might be made a perfect burden to him, although in fact he alone might have read the imputations upon his character. If a man wishes to abuse you, and is not anxious that others should see it, it is surely not too much to require him to pay a penny for a stamp, and put the abuse under cover. It was held by Lord Ellenborough that where it was proved that the defendant knew that a clerk of the plaintiff opened his master's letters in his absence, there was evidence for the jury to consider whether the defendant did not intend the letter to come to the hands of a third person: *Delacroix v. Thevenot*, 2 Stark. 63. Surely in the same way the fact that a person wrote on a post-card would be some evidence of a desire that the contents should be known by others than the plaintiff. It was only last year that an attorney recovered damages in an action for libel, where the libel was part of the direction of a letter addressed to him, as "Old Perjury Jones, of Goring Place, Llanelly, South Wales:" *Jones v. Bewicke*, L. Rep. 5 C. P. 32. It is true that the letter carrier was obliged in the course of his duty to read the direction, but still we submit that the case has a bearing upon the question before us.—*Law Times*.

The Winter Assizes for the County of York will commence on Monday, the 8th January next.

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